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<b>Authors(s)</b>	Shilliday, Paula, McAlinden, Anne-Marie, Gallen, James, Keenan, Marie
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# Non-recent Institutional Abuses and Inquiries:

Truth, Acknowledgement,  
Accountability and Procedural Justice



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June 2023

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## Preface

This policy report was commissioned as part of the *Transforming Justice Responses to Historical Institutional Abuse Project* – a two-year initiative funded by the Higher Education Authority’s North-South Research Programme. The project also received support from The British Academy and the Arts and Humanities Research Council. It brings together researchers based at University College Dublin; Queen’s University Belfast; and Dublin City University and represents a major, wide-ranging, cross-disciplinary study focusing on Ireland (North and South).

The wider project explores the range of justice responses to historical or non-recent institutional abuse including apologies and redress, prosecution and civil suits, as well as inquiries and commissions of investigation. Using the island of Ireland, North and South, as a case-study, the project explores a range of wider themes concerning non-recent institutional abuse including historical and cultural contexts, the Church-State relationship, legal and ideological barriers to justice, and the meaning of ‘truth’, ‘justice’ and ‘accountability’ for victims/survivors. This report focuses on one particular justice mechanism – inquiries and commissions of investigation.

Over the last two decades, historical abuse in state and religiously-operated institutions and some civil society groups and organisations has come under scrutiny around the world. The island of Ireland, comprising Northern Ireland and the Republic of Ireland, has had a large number of investigations, redress schemes or apologies regarding non-recent institutional abuse against women and children, some of which are ongoing. Many of these efforts have been criticised by victims/survivors, academic activists and advocates for deficient processes or inadequate recommendations or outcomes.

Despite widespread acknowledgement that recent official responses to non-recent institutional abuse are lacking in terms of their capacity to deliver truth, acknowledgement, accountability, and procedural justice, discourses are rarely informed by detailed empirical assessment of the views of key stakeholders including victims/survivors, victim-advocates/representatives, lawyers and human rights advocates, judges/commissioners, politicians, policymakers and members of churches and religious orders. This is an important moment, therefore, to stand back and assess justice responses to non-recent institutional abuse across the island of Ireland and how they compare to efforts across the world. This research will provide a guiding standard to improve social and public understanding to redress non-recent institutional abuse across Ireland and elsewhere.

With fieldwork ongoing, these reports are designed to be of immediate value to practitioners and as such we have sought to avoid complex academic terminology and language. We will also develop fully theorised accounts of some of the themes explored in these practitioner/policy reports for academic audiences. The anticipated readership mirrors the diverse range of

interviewees with whom we have been engaging:

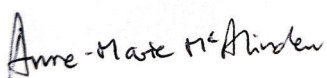
- Victims and survivors
- Legal professionals (including lawyers and judges)
- Government officials
- Local and national policymakers
- The clergy and Church officials
- Civil society activists
- Journalists and other commentators
- Scholars interested in non-recent institutional abuse and dealing with the past

The entire paper series will be made available on our project website (<http://TransformingJusticeProject.org>) along with copies of/links to other project outputs and will be circulated via our various networks and twitter accounts. We hope that you enjoy reading this report and encourage you to disseminate it amongst your colleagues and networks.

For further information about the wider project please feel free to contact us via our website or by email to: [sophie.vandervalk@ucd.ie](mailto:sophie.vandervalk@ucd.ie)



Dr Marie Keenan (UCD)



Prof Anne-Marie McAlinden (QUB)



Dr James Gallen (DCU)

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Investigators, Transforming Justice Project

June 2023

# Acknowledgements and Disclaimer

This report was prepared by Dr Paula Shilliday, in association with the Transforming Justice Project team: Prof Anne-Marie McAlinden (QUB), Dr James Gallen (DCU), Dr Marie Keenan (UCD), and Dr Sophie Van der Valk (UCD).

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# Executive Summary

This Report compares how state responses to non-recent institutional abuse address the justice requirements of victims/survivors.\* The Report outlines the emergence of non-recent institutional abuse as a matter of public concern in western nations and focuses on government responses, particularly through truth-finding inquiry mechanisms and redress or reparations. Throughout the document we use the term ‘inquiry’ broadly to encompass Tribunals of Inquiry, Commissions of Investigation, Public Inquiries, Royal Commissions and Non-statutory Inquiries, unless otherwise stated. The Report provides a brief comparative overview of different inquiry models that have been used across a range of jurisdictions in Table 1 (below) and offers a critique of the strengths and limitations of the various inquiry models. Building on existing literature and other studies with victims/survivors in Ireland and elsewhere, the Report then sets out key principles of best practice in terms of addressing the needs of victims/survivors, accused persons and the institutions in which they worked, concerning truth, acknowledgement, accountability, procedural justice, redress and non-recurrence. Finally, a number of alternative models to the inquiry mechanism are presented (see Table 2 below), each of which is more focused on delivering victim-centric justice.

From the 1990s to the present day, non-recent institutional abuse has emerged as a major social problem. Across Europe, Scandinavia, North America and Australasia, state and church institutions have been grappling with how to respond to past abuses of women and children including, among others, in residential care and medical settings, by members of religious and other non-religious organisations, and via forced removal of children from their families where many suffered abuse and neglect whilst in and out of institutional care. While global responses have included a combination of inquiries, compensation schemes, criminal prosecutions, public apologies, and memorialisation, the success of these measures has varied across mechanisms and jurisdictions regarding their ability to meet the specific needs of victims/survivors.

Inquiries have become the dominant model for responding to non-recent institutional abuse worldwide. These have taken the form of statutory and non-statutory inquiries with different investigatory powers and terms of reference. One of the main strengths of the inquiry mechanism is its ability to publicly and politically engage with the state’s commitment to acknowledge and address systemic wrongdoing. Another strength is its capacity to raise public awareness of the harms in ways that can contribute to positive change by promoting policy, practice, and legislative reform. However, the strengths of inquiries alone are largely outweighed by

\* Note, that while the broader project initially adopted the term ‘historical institutional abuse’ in keeping with the literature on transitional justice, this report adopts the term ‘non-recent institutional abuse’ to better reflect in particular the possible life-long or intergenerational impacts of abuse which, for many victims/survivors, may continue into the present.

their challenges and limitations in terms of meeting victims'/survivors' needs. On the island of Ireland, one overarching problem is that despite numerous separate inquiries/commissions of investigations into non-recent abuses and related issues, many inquiries do not adequately empower victims/survivors through processes that centre their voices and perspectives and promote meaningful participation. A second problem involves the enmeshed relationship between inquiry frameworks and the state, including the composition of the inquiry, the setting of the terms of reference, limits on methodologies, and limited implementation processes for recommendations and follow-through etc. As a result, state-run or state-initiated inquiries may have the effect of preserving institutional or political interests, rather than prioritising the interests of victims/survivors and the general public interest in full (not partial) accountability and non-recurrence. Related to this is the further limitation that across many inquiries there has been a general failure to learn the lessons and effect lasting change.

Within the literature on global responses to non-recent institutional abuse, including empirical studies incorporating the views of victims/survivors, a number of key principles have been identified in terms of what victims/survivors want or need from redress processes. These concern issues of truth and gaining answers to questions; acknowledgement; accountability; procedural justice; follow-through on redress; and non-recurrence:

- **TRUTH** – and answers to important questions for victims/survivors entails knowing what happened, why it happened, who was responsible and their explanations for what they did and for the policy wrongs.
- **ACKNOWLEDGEMENT** – involves explicit articulation or ‘spelling out’ of the offence, harm and wrongdoing, together with clear recognition and validation of victims'/survivors' experiences through processes that centralise their voices and allow their perspectives to directly influence official responses.
- **ACCOUNTABILITY** – requires holding to account the individuals who perpetrated the harms, as well as the institutions of church and state and civil society which enabled the abuses (such as diocese, religious order, governmental department, sporting or recreational organisation).
- **PROCEDURAL JUSTICE** – in the operation of responses to the wrongdoing means ensuring that there are fair decision-making *processes* as well as outcomes.
- **FOLLOW-THROUGH ON REDRESS** – can take the form of monetary reparations, symbolic reparations such as apologies and memorialisation, and measures with therapeutic and healing benefits.
- **NON-RECURRENCE** – implies that justice processes must not only look backwards towards addressing past abuse, but also forwards in terms of supporting and requiring offenders to commit to its non-repetition and institutions to transform their culture and operations to ensure non-recurrence in the future.

In light of the limitations and challenges of inquiries in achieving victim-centric justice, and taking into account the key principles of best practice in addressing victim/survivor needs, this Report sets out a sample of alternative models that have been utilised or proposed internationally to provide 'better' justice for people affected by non-recent institutional abuse. These models are the Truth and Reconciliation Commission in South Africa; the National Inquiry Model in Canada; the Restorative Justice Inquiry in Canada; a proposed hybrid Conventional-Restorative/Transitional Model; and the Northern Irish Truth Recovery Design Panel. Each model focuses to varying degrees on recovering the truth of past wrongdoing in ways which place the experiences of victims/survivors at the centre and prioritise their full and meaningful participation right from initial design to implementation and follow-through redress. Restorative justice principles underpin a number of the models. Central to each model is the need to directly consult with and involve victims/survivors in all aspects of the crafting of the appropriate responses, thereby ensuring that their justice-related needs and interests are adequately addressed.

# Introduction

Over the last few decades, in many countries across Europe, Scandinavia, North America and Australasia, public and political attention has been increasingly drawn to non-recent institutional abuses. These involve, but are not limited to: (1) the othering, categorisation, institutionalisation and past abuses of women and children in residential care settings,<sup>1</sup> including care homes, industrial schools, workhouses, mother and baby institutions, ‘Magdalen laundries’ and psychiatric and other hospitals; (2) past abuses by members of religious organisations, including ‘clerical sexual abuse’<sup>2</sup> and diocesan abuse; (3) the forced removal of children from their families where many suffered abuse and neglect whilst in and out of institutional care, such as within the context of forced adoption, including that relating to child migration overseas,<sup>3</sup> abuses suffered in fostering or placement in ‘cottage homes’ or private homes in the community<sup>4</sup> and abuses in civil society and other institutions. While the types of abuse have varied across jurisdictions, common to all cases is the involvement by commission or omission of government and/or church authorities and/or civil society organisations in the wrongdoing, a failure of entities to protect the rights and dignity of individuals and a culture of policy wrongs.

Globally, public awareness of non-recent institutional abuse involving children emerged during the 1990s, as victims/survivors<sup>5</sup> began to speak publicly about their experiences. This was the case regarding both closed institutions (such as industrial and reformatory schools) and open institutions (such as diocesan settings). In Ireland in particular, investigative journalists and documentary filmmakers were instrumental in exposing revelations of child abuse, sharing victims’/survivors’ stories and drawing attention to how church and state and civil society groups facilitated, and failed to prevent, the wrongdoing.<sup>6</sup> Investigative journalists together

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1 Kathleen Daly, *Redressing Institutional Abuse of Children* (Palgrave Macmillan 2014).

2 Marie Keenan, “‘Them and Us’: The Clerical Child Sexual Offender as “Other”” in Enda McDonagh and Vincent McNamara (eds), *An Irish Reader in Moral Theology: The Legacy of the Last Fifty Years: Volume II* (Columba Press 2011).

3 Gordon Lynch, ‘Catholic Child Migration Schemes from the United Kingdom to Australia: Systemic Failures and Religious Legitimation’ (2020) 44(3) *Journal of Religious History* 273; Gordon Lynch, *UK Child Migration to Australia, 1945-1970: A Study in Policy Failure* (Palgrave Macmillan 2021).

4 Rosemary Nagy and Rodinder Kaur Sehdev, ‘Introduction: Residential Schools and Decolonization’ (2012) 27(1) *Canadian Journal of Law and Society* 67 (Canadian context); Denise Mary Cuthbert and Marian Quartly, ‘Forced child removal and the politics of national apologies in Australia’ (2013) 37(1-2) *American Indian Quarterly* 178 (Australian context).

5 ‘Victims/survivors’ is a dual term accepted in academic and policy discourses to describe people who have suffered past trauma - see Marie Breen-Smyth, *The Needs of Individuals and their Families Injured as a Result of the Troubles in Northern Ireland* (Wave Trauma Centre May 2012).

6 Major documentaries include the RTÉ series ‘States of Fear’ produced by Mary Raftery. Biographies of those who spent their childhood in industrial and reformatory schools include Bernadette Fahy, *Freedom of Angels: Surviving Goldenbridge Orphanage: Childhood in Goldenbridge Orphanage* (The O’Brien Press 1999) and Patrick Touher, *Fear of the Collar: The True Story of the Boy They Couldn’t Break* (Ebury Press 2007).

with the efforts of victims/survivors and the collaborative and organised work of victim-advocates, academics and legal experts, as well as oral historians and archivists, were also pivotal in bringing to light the abuses within Irish Magdalene Laundries.<sup>7</sup> Further to this, media attention focused on mother and baby homes when an amateur historian Catherine Corless sourced details of 796 infant deaths at an institution in Tuam, County Galway.<sup>8</sup> More recently, reports of abuse emanating from civil society groups, including Scouting Ireland and St John's Ambulance; state organisations including the Irish Defence Forces and Higher Education Institutes and Colleges; and through public testimony of victims/survivors regarding the abuses suffered as children at the hands of priests and lay teachers in school settings, (particularly at Belvedere College, Blackrock College and Willow Park Schools in Dublin, among others), have brought fresh allegations of non-recent institutional abuse to the fore.<sup>9</sup> At an international level, documentaries and media coverage in conjunction with the accounts and advocacy of victims/survivors and their representative groups (which often coincided with civil lawsuits brought by victims/survivors against individual perpetrators, religious congregations and civil authorities) acted as a major trigger in 'breaking the silence' on abuse.<sup>10</sup>

As a means of responding to non-recent institutional abuse, state governments around the world have invoked a number of measures, including criminal prosecutions, inquiries, apologies, compensation schemes and memorialisation. Many of these processes are similar to those utilised in societies transitioning from conflict or authoritarian regimes in the aftermath of gross human rights violations, with the 'language and tools of transitional justice' having a significant impact on the formulation of approaches to non-recent institutional abuse in settled democracies.<sup>11</sup> In some jurisdictions, restorative justice principles and values have also

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7 James Smith, *Ireland's Magdalen Laundries and the Nation's Architecture of Containment* (Manchester University Press 2008); Claire McGettrick and others, *Ireland and the Magdalene Laundries: A Campaign for Justice* (Bloomsbury Publishing 2021); Katherine O'Donnell, 'Academics Becoming Activists: Reflections on Some Ethical Issues of the Justice for Magdalenes Campaign' in Pillar Villar-Argáiz, *Irishness on the Margins: Minority and Dissident Identities* (Palgrave Macmillan 2018); Justice for Magdalenes, 'State Complicity and Constitutional Rights' (Submission to IHRC: July 2010) <[http://jfmresearch.com/wp-content/uploads/2017/03/JFM\\_IHRC\\_June\\_2010.pdf](http://jfmresearch.com/wp-content/uploads/2017/03/JFM_IHRC_June_2010.pdf)> accessed 1 March 2023; Justice for Magdalenes Research, 'NGO Submission to the UN Committee Against Torture' (July 2017) <[https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT\\_CAT\\_CSS\\_IRL\\_27974\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT_CAT_CSS_IRL_27974_E.pdf)> accessed 1 March 2023.

8 Catherine Corless, *Belonging: One Woman's Search for Truth and Justice for the Tuam Babies* (Hachette Books Ireland 2021).

9 See eg Barry Roche, 'Sexual abuse at Blackrock College should be investigated by gardaí, says Taoiseach' *The Irish Times* (Dublin, 12 November 2022) <<https://www.irishtimes.com/crime-law/2022/11/12/sexual-abuse-at-blackrock-college-should-be-investigated-by-gardai-taoiseach-says/>> accessed 1 March 2023.

10 Anne-Marie McAlinden, 'An Inconvenient Truth: Barriers to Truth Recovery in the Aftermath of Institutional Child Abuse in Ireland' (2012) 33(2) *Legal Studies* 189, 194.

11 McAlinden (n 10) 191.

influenced the thinking, such as in Canada and New Zealand.<sup>12</sup> While the timing and combination of measures is not always consistent across jurisdictions, scholars observe a ‘transnational’ trend in state responses, whereby state processes in particular countries are generally inspired and influenced by those that have developed elsewhere.<sup>13</sup>

The ‘inquiry’ has been the dominant truth-finding model used by governments in response to non-recent institutional abuse,<sup>14</sup> along with apologies, redress or reparations in many forms. While truth may be regarded as one element of broader redress efforts,<sup>15</sup> the present focus is not on wider aspects of redress relating to account-making or responsibility-taking but rather on inquiries as forms of truth-finding. In the United Kingdom and other Commonwealth countries, as well as parts of Northern, Western and Central Europe, there have been a number of inquiries into non-recent institutional abuse.<sup>16</sup> While the fact-finding or truth-seeking function of inquiries is a common feature, their success in this regard across and within jurisdictions has been varied. The following discussion considers the main characteristics of the principal models of inquiries into non-recent institutional abuse with regard to their truth-finding dimensions.

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12 Jennifer Llewellyn, ‘Nova Scotia restorative inquiry offers new vision of justice’, *Policy Options* (4 February 2020) <<https://policyoptions.irpp.org/magazines/february-2020/restorative-inquiry-offers-new-vision-of-justice-for-african-nova-scotians/>> accessed 3 February 2023; Meredith Gibbs, ‘Using Restorative Justice to Resolve Historical Injustices of Indigenous Peoples’ (2009) 12(1) *Contemporary Justice Review* 45.

13 Johanna Sköld, ‘Apology Politics: Transnational Features’ in Johanna Sköld and Shurlee Swain (eds), *Apologies and the Legacy of Abuse of Children in ‘Care’: International Perspectives* (Palgrave Macmillan 2015) 26.

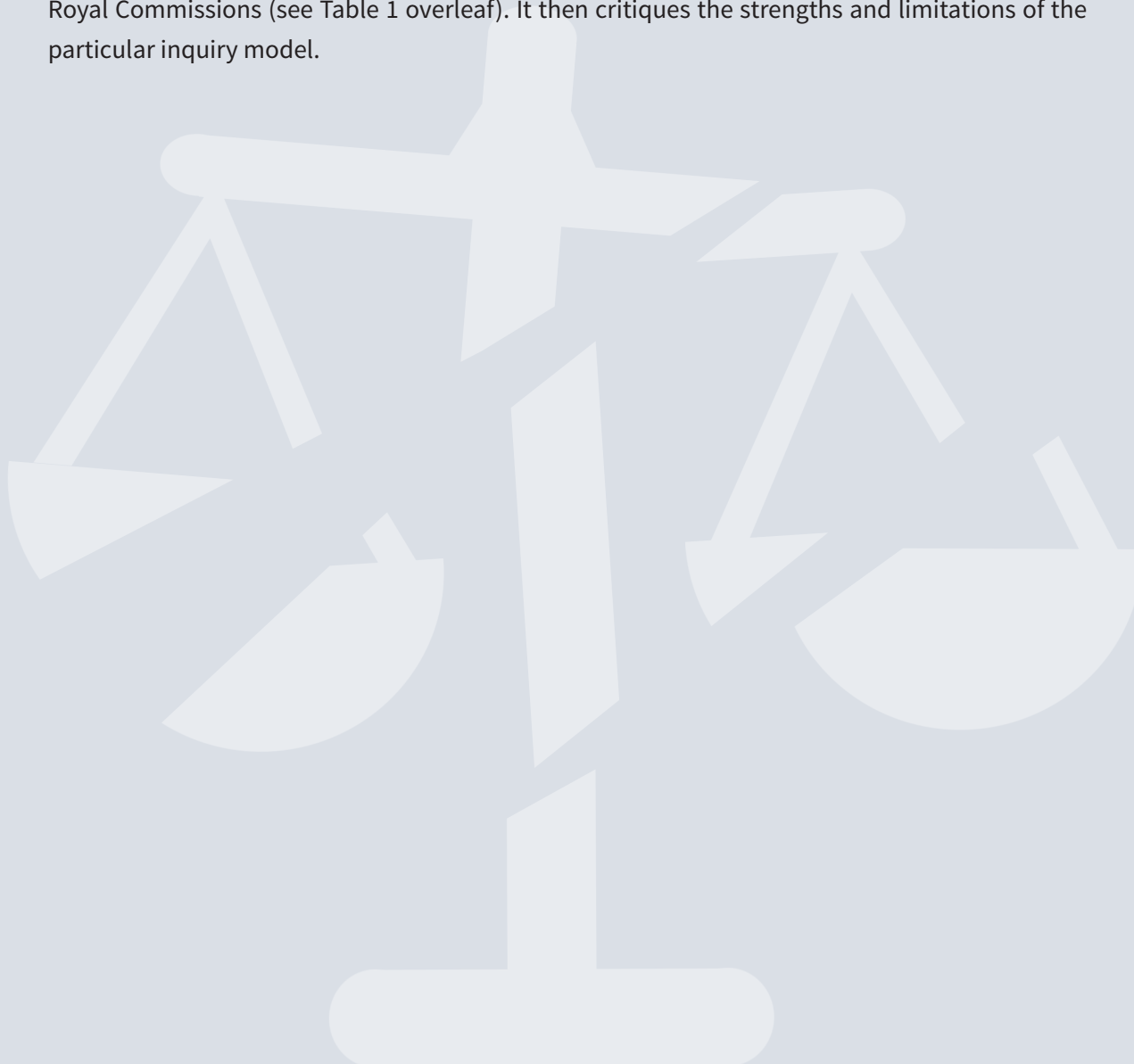
14 Anne-Marie McAlinden and Bronwyn Naylor, ‘Reframing Public Inquiries as Procedural Justice for Victims of Institutional Child Abuse: Towards a Hybrid Model of Justice’ (2016) 38(3) *Sydney Law Review* 277, 278.

15 Margaret Urban Walker, ‘Truth Telling as Reparations’ (2010) 41(4) *Metaphilosophy* 525.

16 See eg Johanna Sköld, ‘Historical Abuse – A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Care Worldwide’ (2013) 14(1) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 5; Katie Wright, Shurlee Swain and Kathleen McPhillips, ‘The Australian Royal Commission into Institutional Responses to Child Sexual Abuse’ (2017) 74(1) *Child Abuse and Neglect* 1; Daly (n 1); Sköld and Swain (n 13).

# A Comparative Overview of State Responses to Non-recent Institutional Abuse

‘Inquiry’ is an umbrella term for different types of investigation used ‘to establish facts, to learn lessons so that mistakes are not repeated, to restore public confidence and to determine accountability.’<sup>17</sup> This section provides a brief comparative overview of different national and international inquiry models that have been used, comparing and contrasting the key features of tribunals of inquiry, commissions of investigation, public inquiries, non-statutory inquiries, and Royal Commissions (see Table 1 overleaf). It then critiques the strengths and limitations of the particular inquiry model.



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17 Graeme Cowie, ‘Statutory public inquiries: the Inquiries Act 2005’, *House of Commons Library* (2002), Number SN06410.





**Table 1:**  
**National and International Inquiries into Non-recent Institutional Abuses: Key Features (a)**

TYPE OF INQUIRY	Mode	Methodology/Terms of Reference	Composition	Legal Powers	Types of Hearing	Reporting Timeframe/ Outcomes	Impact on Policy and Practice
<b>TRIBUNAL OF INQUIRY (ROI)</b>	Statutory	<p>Investigates matters of urgent public importance relating to systemic wrongdoing</p> <p>Function is purely fact-finding and inquisitorial (no power to administer justice)</p> <p>Terms of Reference set by the government</p>	Consists of one or more persons and is usually chaired by a judge or senior lawyer	<p>Can enforce attendance and examination of witnesses (and can apply to the High Court if a person refuses to give evidence)</p> <p>Can compel production of documents</p> <p>Can authorise the legal representation of any person appearing before the Tribunal, or refuse to allow representation</p> <p>Can cross-examine witnesses</p> <p>A statement or admission cannot be used in evidence against a person in criminal proceedings. Sometimes tribunal findings can give rise to an investigation leading to independent criminal or civil proceedings</p>	<p>Sittings usually held in public but can, at Tribunal's discretion, be held in private if it is in the public interest to do so</p>	<p>Timeframe of inquiry stipulated by the government</p> <p>Submits report of findings to government</p>	In many cases, Tribunal is given power to make recommendations with a view to preventing the same problem happening again
<b>COMMISSION OF INVESTIGATION (ROI)</b>	Statutory	<p>Investigates matters of significant public concern relating to systemic, rather than individual, wrongdoing</p> <p>Intended to be less expensive and speedier than a tribunal of inquiry, as based on a sample of cases</p> <p>Function is fact-finding and inquisitorial</p> <p>Terms of Reference set by the government</p>	Consists of one or more persons and is usually chaired by a judge or senior lawyer	<p>Seeks voluntary co-operation of witnesses, but has power to compel people to give evidence if necessary</p> <p>Can direct a person to provide documents</p> <p>Legal representation is allowed if Commission is satisfied it is necessary in interests of the investigation and fair procedures</p> <p>Witnesses may be cross-examined if the Commission agrees</p> <p>Evidence given cannot be used in criminal or other proceedings</p>	<p>Hearings normally conducted in private except in exceptional circumstances</p> <p>Less like a court of law than tribunals</p> <p>Private hearings can lead to less scrutiny</p> <p>The Ryan Commission is bespoke but had all the powers of a tribunal</p> <p>Two Commissions (Ryan and Mother and Baby Homes Commissions) comprised 2 separate committees: Confidential Committee and Investigative Committee. Confidential Committee (private sessions with a 'story telling' or narrative function) heard victims'/survivors' accounts in a confidential and sympathetic setting, with testimony not being contested. Investigative Committee (public and private hearings) drew on contested evidence</p>	<p>Terms of reference must be accompanied by statements setting out expected time and costs</p> <p>Submits a final report of its findings to a specified Minister</p> <p>Minister may request interim reports on general progress of investigation or on a particular aspect</p> <p>Provisions for people named in report to challenge the findings in relation to them</p>	<p>Report may make recommendations as required by terms of reference</p> <p>If no specific remit to make recommendations, the report may express views on matters of significance</p>

**Table 1:**  
**National and International Inquiries into Non-recent Institutional Abuses: Key Features (b)**

TYPE OF INQUIRY	Mode	Methodology/Terms of Reference	Composition	Legal Powers	Types of Hearing	Reporting Timeframe/Outcomes	Impact on Policy and Practice
<b>PUBLIC INQUIRY (NI)</b>	Statutory	<p>Investigates matters of public concern relating to systemic wrongdoing</p> <p>No power to determine liability or punish any person</p> <p>Fact-finding or inquisitorial function</p> <p>Similar to the Tribunal of Inquiry in ROI</p> <p>Differs from the Commission of Investigation in ROI regarding the public inquiry's legal power to compel witnesses and documentation</p> <p>Terms of Reference set by the government</p>	Consists of one or more persons and is usually chaired by a judge or senior lawyer	<p>Power to compel attendance of witnesses</p> <p>Power to compel production of documents</p> <p>Legal sanctions for non-compliance, including imprisonment, fine or both</p> <p>Core participants are entitled to legal representation</p> <p>The Inquiry legal team can question witnesses at hearings.</p> <p>No victims or survivors are cross-examined except with permission of the Chairman</p> <p>No legal power to find anyone guilty of criminal offence. If information received that a crime has been committed, details are passed to police</p>	<p>Presumption that hearings are public, but can be private</p> <p>Private hearings can be used for victims/survivors to give their accounts in a confidential setting</p>	<p>Timeframe of inquiry stipulated by the government</p> <p>Submits report of findings to the government</p>	Report may make recommendations as required by terms of reference
<b>NON-STATUTORY INQUIRY (ROI and NI)</b>	Non-statutory	<p>Established into a matter of public importance</p> <p>Greater flexibility on procedure to enable a less formal and adversarial form of inquiry than a statutory inquiry</p> <p>Fact-finding or inquisitorial function</p> <p>Terms of Reference set by the government</p>	Can be chaired by persons with different types of expertise to a judge	<p>No power to compel witnesses to give evidence</p> <p>No power to compel witnesses to produce evidence relevant to Inquiry's work</p> <p>Lack of legal powers to compel witnesses and documents means greater risk that uncooperative witnesses or core participants will impede Inquiry's progress</p> <p>Witnesses can be cross-examined</p>	Hearings can be public or private	<p>Timeframe of inquiry stipulated by the government</p> <p>Submits report to government</p>	Report can make recommendations relating to Inquiry terms of reference
<b>ROYAL COMMISSION (Australia)</b>	Statutory	<p>Established as an investigation, independent of government, into a matter of great importance relating to systemic wrongdoing</p> <p>Fact-finding or inquisitorial function</p> <p>Similar in function to public inquiry, tribunal of inquiry or commission of investigation. Royal Commissions in Australia have statutory powers similar to those of UK public inquiries</p> <p>Royal Commissions usually involve research into an issue, consultations with experts within and outside government, and public consultations</p> <p>Terms of Reference set by the government</p>	Chaired by one or more figures such as a judge, with commissioners appointed by government	<p>Power to compel witnesses</p> <p>Power to compel production of documentation</p> <p>Power to cross examine witnesses</p> <p>Legal representation of witnesses is allowed</p> <p>Power to forward evidence to police</p>	Hearings can be public or private	<p>Timeframe of inquiry stipulated by the government</p> <p>Inquiry submits report to government</p>	Report can make legal and policy recommendations



## *National and International Inquiries*

In the Republic of Ireland (ROI), a piecemeal approach has been adopted to investigating various forms of non-recent institutional abuse, principally via commissions of investigation and non-statutory inquiries. This fragmented approach has been highlighted as an obstacle to justice.<sup>18</sup>

Looking first to clerical child sexual abuse in specific dioceses, this was examined through a non-statutory inquiry and two commissions of investigation, each led by a judge. The first of these was the Ferns Inquiry (2003-2005), a non-statutory inquiry into allegations of clerical sexual abuse in the Catholic diocese of Ferns in County Wexford.<sup>19</sup> Its remit was to identify complaints and allegations made against clergy and report on the Church and State response to those allegations; it was not concerned with the truth or otherwise of the complaints. The Ferns Inquiry was established as a three-person team under the chairmanship of Mr Justice Francis D Murphy, formerly of the Supreme Court, along with Dr Helen Buckley, an academic in social work with expertise in child protection, and Dr Laraine Joyce, deputy director of the Office for Health Management. The Inquiry conducted its work through research and consultation on child sexual abuse and management structures of institutions involved, as well as private sessions to hear oral evidence from victims/survivors and representatives of church and state. Evidence was unsworn and witnesses could not be cross-examined. The Ferns report made a number of recommendations including the need for a national campaign about child sexual abuse and organisational protocols to safeguard children.

The judge-led Commission to Inquire into Child Abuse (2000-2009) (Ryan Commission/CICA)<sup>20</sup> examined the causes, nature, circumstances, and extent of abuse of children in industrial and reformatory schools. At the time of the publication of the Commission's report, its Commissioners were Mr Justice Sean Ryan, a High Court judge; Norah Gibbons, a child care director; Fred Lowe, a psychologist; Marian Shanley, a Law Reform Commissioner; and two social workers, Anne McLoughlin and Mary Fennessy. Its work was conducted through two separate Committees: the Confidential Committee and the Investigation Committee. The Confidential Committee heard the evidence of victims/survivors in a private setting, with this evidence not being contested. The Investigation Committee, by contrast, heard evidence from witnesses who wished to have their allegations investigated. For this reason, it drew on contested evidence and was adversarial in practice, factors reported as re-traumatising for victims/survivors.<sup>21</sup> All parties involved in the

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18 James Gallen, 'Redressing Gendered Mistreatment: Magdalene Laundries, Symphysiotomy and Mother and Baby Homes' in Lynsey Black and Peter Dunne (eds), *Law and Gender in Modern Ireland: Critique and Reform* (Hart Publishing 2019).

19 Mr Justice Francis Murphy, *The Ferns Report* (Presented to the Minister for Health and Children, October 2005).

20 Commission to Inquire into Child Abuse, *Report of the Commission to Inquire into Child Abuse* (Dublin: The Stationery Office, May 2009).

21 Sinead Pembroke, 'Historical Institutional Child Abuse in Ireland: Survivor Perspectives on Taking Part in the Commission to Inquire into Child Abuse (CICA) and the Redress Scheme' (2019) 22(1) *Contemporary Justice Review* 43.

Investigation Committee were entitled to legal representation and to cross-examine witnesses. People who wished to provide evidence had the option of testifying to *either* the Confidential or Investigation Committee. Only a limited sample of cases were heard to allow the Commission to complete its work in a reasonable timeframe. The sampling of cases was a cause of upset for victims/survivors who wanted a space for their experiences to be recorded and represented as part of the Commission's findings.<sup>22</sup> Following legal challenges by the Christian Brothers, no priests or brothers against whom allegations were made were named in the Commission's report, including those who had already been criminally convicted. The report made some recommendations around alleviating the effects of past abuse and preventing re-occurrence, some of which have yet to be implemented.<sup>23</sup> In Sinead Pembroke's empirical research with participants, the majority of those interviewed felt that both CICA and the related redress board had 'triggered feelings of shame and stigma in relation to their time in the institution.'<sup>24</sup> Carol Brennan suggests: 'It is possible that the failures of the Irish state in its duty of care for children may have, unwittingly or carelessly, been replicated in its attempts to acknowledge and remedy the situation.'<sup>25</sup> Some of the broader weaknesses of commissions of investigation in delivering victim-centred justice are outlined further below.

Commissions of Investigation were also established to report on the handling by Church and State authorities of allegations or complaints of child sexual abuse made against clergy operating in the Catholic Archdiocese of Dublin and the Catholic Diocese of Cloyne and the response to such cases (Murphy Report 2009<sup>26</sup> and Cloyne Report 2011<sup>27</sup>). The Commissioners for both Commissions were Judge of the Circuit Court Yvonne Murphy, Barrister Ita Mangan and Solicitor Hugh O'Neill. Both Commissions conducted their work through an in-depth analysis of documentation supplied by Church and State authorities, as well as private sessions hearing oral evidence on a *representative* sample of allegations. The manner in which the sampling occurred in the Murphy Commission drew critique, this time from social scientists and clerics.<sup>28</sup> They questioned the methodology

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22 Eoin Burke-Kennedy, 'Group says abuse sampling approach a 'stab in the back'' *The Irish Times*, (Dublin, 18 September 2003) <<https://www.irishtimes.com/news/group-says-abuse-sampling-approach-a-stab-in-the-back-1.499663>> accessed 11 Apr 2023.

23 Ireland has been criticised for failing to follow through on its recommendations at the United Nations: see e.g. UN Committee on the Elimination of Discrimination against Women (9 March 2017) <<https://undocs.org/CEDAW/C/IRL/CO/6-7>>; and UN Committee against Torture (31 August 2017) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/255/42/PDF/G1725542.pdf?OpenElement>>.

24 Pembroke (n 21) 51.

25 Carol Brennan, "Trials and Contestations: Ireland's Ryan Commission" in Johanna Sköld and Shurlee Swain (eds), *Apologies and the Legacy of Abuse of Children in 'Care'* (Palgrave Macmillan 2015) 56.

26 Commission of Investigation, *Report into the Catholic Archdiocese of Dublin* (Dublin, Department of Justice, Equality and Law Reform, July 2009).

27 Commission of Investigation, *Report into the Catholic Diocese of Cloyne* (Dublin: Department of Justice July 2011).

28 Pádraig McCarthy, 'The Murphy Report Revisited' (2013) 102(408) *Studies: An Irish Quarterly Review* 388; John McDonagh, 'The Representative Sample in the Murphy Report' (2013) 102(408) *Studies: An Irish Quarterly Review* 456.

used for selecting the allegations and cases to be analysed, argued that the methodology was not clearly specified in the report, and suggested that the Commission had failed to generate a representative sample in the social science understanding of the term. While some victims/survivors had a positive experience of the Murphy Commission,<sup>29</sup> some senior diocesan officials felt they were treated as though 'on trial'.<sup>30</sup> It was suggested that the inquisitorial intent of the Commission of Investigation Act (2004) gave way to an adversarial format in practice in some cases. The Murphy report had no remit to make recommendations, but expressed its views on a range of matters it considered significant. The Cloyne report made a number of recommendations including the need for an immediate safeguarding policy for children. It is noteworthy that while a commission of investigation is intended to examine systemic wrongdoing, the Murphy report discussed eleven priests by name (using pseudonyms for others) and named several bishops including their actions, some of whom said they were reported inaccurately, while the Cloyne report used pseudonyms for all priests against whom allegations were made. None took the option of challenging the findings of the report in court, but some challenged the accuracy of the reporting of their testimony by letter, when sent to them by the Commission for review.<sup>31</sup> Some reported that inaccurate accounts of their testimony were not corrected in the final report.<sup>32</sup>

Magdalene Laundries were examined through a non-statutory inquiry taking the form of an Inter-departmental Committee consisting of senior representatives from government departments and an Independent Chair (McAleese Committee 2011-2013).<sup>33</sup> Its mandate was to establish the facts of state involvement with the Magdalene Laundries, with the working methods, procedures and exact nature of the mandate being decided by the Committee itself. Initially, the Committee did not intend to speak in person to women committed to the institutions, and it was only after challenges from advocates and activists that private oral hearings were conducted.<sup>34</sup> However, the manner in which women were repeatedly questioned left them feeling that their testimonies were not believed.<sup>35</sup> The Committee's investigation has been widely criticised as an incomplete account of the circumstances surrounding the institutions, due to the fact that its remit did not extend to truth-finding investigations into allegations of abuse.<sup>36</sup> Given that the Committee did not assess allegations of individual wrongdoing, including human rights violations, its report

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29 Marie Collins, 'What the Murphy Report Means to Me' (2013) 102(408) *Studies: An Irish Quarterly Review* 406.

30 Marie Keenan, 'Senior Diocesan Officials and the Murphy Report' (2013) 102(408) *Studies: An Irish Quarterly Review* 434.

31 Keenan (n 30).

32 Marie Keenan (2010), Personal Communication with Bishop and Legal Adviser for senior clerics.

33 Department of Justice, *Report of the Inter-Departmental Committee to Establish the Facts of State Involvement with the Magdalen Laundries* (February 2013).

34 Gallen (n 18).

35 Gallen (n 18).

36 Maeve O'Rourke, 'The Justice for Magdalenes Campaign' in Suzanne Egan (ed), *International Human Rights: Perspectives from Ireland* (Bloomsbury Publishing 2015).

further marginalised victims'/survivors' lived experiences and minimised the harms suffered.<sup>37</sup>

Non-statutory processes were also utilised to examine the practice of symphysiotomy – an operation performed to increase the size of the pelvic outlet to permit vaginal delivery of a baby. The measures adopted for this investigation were a report (2014)<sup>38</sup> and an independent review (2014).<sup>39</sup> The report had two phases: the first was an independent academic research report and the second involved consultation with relevant stakeholders to provide comment on the report. The independent review was led by a judge and made redress recommendations. It is notable that the symphysiotomy process failed to document the testimonies of women involved in the procedure, and by emphasising that many women went on to lead healthy lives thereafter it called into question the extent of the harms endured.<sup>40</sup>

The most recent inquiry into non-recent institutional abuse in ROI was the judge-led Commission of Investigation into Mother and Baby Homes and certain related matters (2015-2021), which examined the experiences of women and children, the institutions involved and the role of government in the oversight of the institutions.<sup>41</sup> Similar to the framework of the Ryan Commission, the Commission of Investigation into Mother and Baby Homes comprised two strands: a Confidential Committee and an Investigative Committee. The purpose of the Confidential Committee was to hear the personal testimonies of former residents of the institutions or people who worked there in a private and informal setting. Unlike the Ryan Commission, victims/survivors could give testimony to the Confidential Committee, the Investigative Committee or both. However, many people were unaware that they could provide evidence to both Committees.<sup>42</sup> Furthermore, people were not adequately informed that testimony offered to the Confidential Committee would have minimal influence on the Commission's findings.<sup>43</sup> Thus, among the many problems with the Commission's final report is that it is based only on testimony provided to the Investigative Committee along with the Commission's investigation of documentary evidence from State and Church institutions, with little attempt to integrate the 550 statements

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37 Maeve O'Rourke, 'Ireland's Magdalene Laundries and the State's Duty to Protect' (2011) 10 *Hibernian Law Journal* 200; Gallen (n 18).

38 Oonagh Walsh, *Report on Symphysiotomy in Ireland, 1944-1984* (Glasgow Caledonian University 2014).

39 Department of Health, *Independent Review of Issues relating to Symphysiotomy* (March 2014).

40 Gallen (n 18).

41 Commission of Investigation into Mother and Baby Homes, *Final Report of the Commission of Investigation into Mother and Baby Homes* (Dublin: Department of Children, Equality, Disability, Integration and Youth, January 2021).

42 Patrick Corrigan and Patricia Lundy, *Learning the Lessons: Seminar Series: Co-designing the Inquiry / Investigation into Mother and Baby and Magdalene Laundry Institutions in Northern Ireland* (Amnesty International & Ulster University June 2021).

43 Máiréad Enright and Aoife O'Donoghue (eds), *Mother and Baby Homes Commission of Investigation Report: Draft Alternative Executive Summary* (13 July 2021) 3 <<https://www.tudublin.ie/media/website/news/2021/main-news/Draft-September-24.pdf>> accessed 30 January 2023.



given by victims/survivors to the Confidential Committee, thereby effectively disregarding their testimonies.<sup>44</sup> Other problems involve the report's failure to centralise victims'/survivors' voices and inaccurate recording of their lived experiences,<sup>45</sup> issues considered further below.

Turning to Northern Ireland (NI), investigation of non-recent institutional abuse is at a less advanced stage than in ROI, largely because of 'the Troubles' which have dominated political and social discourse.<sup>46</sup> The main investigation into sexual and physical abuse of children in Northern Irish residential institutions - the Historical Institutional Abuse Inquiry (Hart Report)<sup>47</sup> - took the form of a judge-led public inquiry to examine systemic failings by institutions or the state in their duties towards the children in their care under the Chairmanship of Sir Anthony Hart. This was comprised of two main components: a confidential Acknowledgement Forum (similar to the Confidential Committee in ROI inquiries) and a public statutory inquiry. The first component provided an opportunity for victims/survivors to recount their experiences confidentially in a private setting without challenge and was generally well received.<sup>48</sup> The second component took the form of an inquiry and investigative panel with statutory powers. Unlike the Ryan Commission, victims/survivors could decide whether they wished to participate in the Acknowledgement Forum only *or in both* components. The Inquiry held public hearings during which people gave evidence under oath and had statutory powers to compel witnesses and documents. Given the non-core status of victims/survivors, they were not entitled to legal representation.<sup>49</sup> The Inquiry report took into consideration the Acknowledgement Forum's report summarising the experiences of victims/survivors. While a public inquiry (like a commission of investigation in ROI) is intended to be inquisitorial, many victims/survivors were re-traumatised by the adversarial nature of the process.<sup>49</sup> Another perspective, however, suggested some benefits and limits of the NI response as further outlined below.

In terms of Mother and Baby Institutions, Magdalene Laundries and Workhouses in NI, recommendations have been made for the establishment of an expert non-statutory Independent Panel to gather documentary evidence and record victim/survivor testimony to

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44 Enright and O'Donoghue (n 43).

45 James Gallen, 'Institutions and Ireland: Mother and Baby Homes and Transitional Justice' (2022) 52(1) *Irish University Review* 103.

46 The Troubles in NI have largely obscured the issue of sexual violence – see Monica McWilliams, 'Violence Against Women and Political Conflict: The Northern Ireland Experience' (1997) 8(1) *Critical Criminology* 78; Catherine O'Rourke and Aisling Swaine, 'Gender, Violence and Reparations in Northern Ireland: A Story Yet to be Told' (2017) 21(9) *The International Journal of Human Rights* 1302.

47 Historical Institutional Abuse Inquiry (2017), *Report of the Inquiry into Historical Institutional Abuse* (Belfast: The Inquiry into Historical Institutional Abuse 1922 to 1995 and The Executive Office, January 2017).

48 Patricia Lundy, 'Through the Lens of Survivors: Lessons from the Northern Ireland Historical Institutional Abuse Inquiry' (Briefing Paper, Ulster University, February 2020).

49 Brandon Hamber and Patricia Lundy, 'Lessons from Transitional Justice? Toward a New Framing of a Victim-Centered Approach in the Case of Historical Institutional Abuse' (2020) 15(6) *Victims & Offenders* 744. See also Lundy (n 48).

run in parallel to a statutory public inquiry.<sup>50</sup> Importantly, this Panel will play a key role in feeding into the design of the statutory inquiry as distinct from merely taking the findings into account in the statutory inquiry which happened in the Hart Inquiry. This model of investigation is discussed below as an alternative justice model.

Turning to the international context, the Australian Royal Commission into Institutional Responses to Child Sexual Abuse (2013-2017)<sup>51</sup> was the largest inquiry in Australia to date to investigate how institutions such as schools, churches and government organisations have responded to allegations of child sexual abuse. Differing from inquiries throughout Ireland, the Royal Commission was led by a panel of six commissioners made up of various professionals including a former child migrant, recognising that appointing victims/survivors and their representatives to key roles in the inquiry mechanism is central to participation.<sup>52</sup> Its investigation was conducted through public hearings, private sessions, roundtables, workshops, and an extensive research programme. Upon establishment, the Royal Commission reported that its first priority was to hear directly from victims/survivors, and its work has been praised for its emphasis on prioritising the voices of those affected by the wrongdoing.<sup>53</sup> Private trauma-informed sessions allowed people who experienced abuse to share their experience, with this information being crucial to the development of the Royal Commission's understanding of institutional child sexual abuse and its impacts. The Commission was visionary in its commitment to the dignity of victims/survivors and to the value of their testimony.<sup>54</sup> Indeed, while many lawyers were involved in the Commission's work (similar to various inquiries across the island of Ireland), it specifically avoided unnecessary adversarial questioning.<sup>55</sup> Public hearings took the form of case studies during which evidence was received about abuses within a particular institution, or a small number of related institutions. Hearings with a broad policy focus, as distinct from investigations into specific institutions, were also conducted. The Royal Commission's interim and final reports made extensive recommendations, many relating to changes in policies, practices and systems to prevent institutional child sexual abuse into the future, and better respond when abuse does occur. The 'publicness' of the Royal Commission has been highlighted as crucial to its operation, keeping people apprised of its work, as well as being 'informative, educative and transparent.'<sup>56</sup> The discussion now considers some of the main strengths and limitations of the inquiry

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50 Deirdre Mahon, Maeve O'Rourke and Phil Scraton, *Mother and Baby Institutions, Magdalene Laundries and Workhouses in Northern Ireland: Truth, Acknowledgement and Accountability* (October 2021).

51 Royal Commission into Institutional Responses to Child Sexual Abuse (Australia), *Final Report* (December 2017).

52 Corrigan and Lundy (n 42).

53 Wright, Swain and McPhillips (n 16).

54 Michael Salter, 'The Transitional Space of Public Inquiries: The Case of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse' (2020) 53(2) *Australian and New Zealand Journal of Criminology* 213.

55 Corrigan and Lundy (n 42).

56 Wright, Swain and McPhillips (n 16).

mechanism as a response to non-recent institutional abuse. Further insights into the benefits and limits of inquiries are provided in the later section on key principles of best practice in victim-centred approaches to justice.

## *Strengths of Inquiry Mechanisms*

Literature on inquiries more broadly indicates their potential to learn lessons from past events in order to inform the future.<sup>57</sup> A key strength is their ability to restore public confidence in the aftermath of a scandal or crisis.<sup>58</sup> They have significant ‘ritualistic, symbolic, and pedagogical dimensions’ in terms of how they highlight issues of major social concern and serve a distinctly educative function for both government and society.<sup>59</sup> In addition, inquiries can assist in opening conversations around issues which are poorly understood, playing a key role in developing new ways of conceptualising a problem<sup>60</sup> and producing new information.<sup>61</sup> The main strengths of inquiries highlighted in literature on historical/non-recent abuse are (1) their fact-finding and truth seeking potential; (2) their ability to socially and politically acknowledge the wrongdoing; and (3) their capacity to raise public awareness of the harms in ways which can contribute to positive change.

- (1) **Fact-Finding and Truth Seeking** – What an inquiry acknowledges and fails to acknowledge as true, as wrong and as significant will shape official and popular understandings of historical/non-recent abuse. Several conceptions of truth inform investigations into past abuse in transitional justice. For instance, the report of the South African Truth and Reconciliation Commission considered four types of truth: (i) objective, factual, forensic truth; (ii) personal or narrative truth of both victim and perpetrator; (iii) social or dialogical truth; and (iv) restorative truth.<sup>62</sup> As a result, investigations face the delicate task of balancing between what Chapman and Ball refer to as ‘micro-truth’, which refers to the details of specific events and human rights violations, typically voiced in victim testimony, and ‘macro-truth’, which ‘provides a framework for understanding the structural causes of

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57 Alastair Stark, *Public Inquiries, Policy Learning, and the Threat of Future Crises* (Oxford University Press 2018).

58 Adam Ashforth, ‘Reckoning Schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms’ (1990) 3(1) *Journal of Historical Sociology* 1.

59 Katie Wright, ‘Remaking Collective Knowledge: An Analysis of the Complex and Multiple Effects of Inquiries into Historical Institutional Child Abuse’ (2017) 74 *Child Abuse & Neglect* 10, 12.

60 Sandra L Resodihardjo, ‘Wielding a Double-Edged Sword: The Use of Public Inquiries at Times of Crisis’ (2006) 14(4) *Journal of Contingencies and Crisis Management* 199.

61 John Pratt and George Gilligan, ‘Introduction: Crime, Truth and Justice – Official Inquiry and the Production of Knowledge’ in George Gilligan and John Pratt (eds), *Crime, Truth and Justice: Official Inquiry, Discourse, and Knowledge* (Routledge 2004).

62 Graeme Simpson and Paul van Zyl, ‘South Africa’s Truth and Reconciliation Commission’ (1996) 585 *Temps Modernes* 394.

violence.<sup>63</sup> An effective inquiry could address each type of truth and provide clear expectations to all participants through its terms of reference, operating protocols and methodology on how it will assess and validate each dimension of facts and truth.

- (2) **Social and political acknowledgement** – A key function of inquiries is to provide social recognition of what happened, thereby representing moral rituals or ‘symbolic interventions in public memory.’<sup>64</sup> Inquiries importantly produce a national historical record of the harms, enabling an assessment of the nature and extent of the wrongdoing that has occurred, especially widespread or systemic harms or harms across an entire institutional context.<sup>65</sup> The ‘collective knowledge’ produced by inquiries may also have an educative role for governments and societies. Inquiries bear witness to the sufferings of victims/survivors, raise public awareness, educate the public at large, hold individuals and institutions to account, change the historical record, and give voice to individuals and groups who have been marginalised and silenced.<sup>66</sup> These broader social dimensions of acknowledging past wrongdoing are important for both victims/survivors themselves and the wider community, being crucial to fostering societal and cultural change and to preventing future re-occurrence.
- (3) **Awareness Raising and Reform** – Inquiries have the potential to make a significant contribution to raising awareness of institutional abuses and to promote policy, practice and legislative reform.<sup>67</sup> In this regard, the Australian Royal Commission has been lauded for how it helped make child sexual abuse ‘speaking and nameable as a widespread and insidious social problem.’<sup>68</sup> By incorporating both justice and therapeutic goals through its engagement with ‘psychologically informed cultural narratives of childhood trauma and its ongoing impacts,’ the Royal Commission provided a framework for making sense of long-term victim/survivor experiences of adversity and suffering together with the intergenerational impacts of child sexual abuse.<sup>69</sup> Its victim-centric, therapeutically-oriented approach which opened a space for victim/survivor voices to be heard helped bridge the gap between private suffering and public understanding. This factor then enabled victims/survivors to influence the development of policy responses to child sexual abuse in the longer-term.

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63 Audrey R Chapman and Patrick Ball, ‘Levels of Truth: Macro-truth and the TRC’ in Hugo van der Merwe and Audrey R Chapman (eds), *Truth and reconciliation in South Africa: Did the TRC deliver?* (Routledge 2008).

64 Gordan Lynch, ‘Historical Abuse, Trauma and Public Acts of Moral Repair’ in Anne Strhan, Stephan G Parker and Susan Ridgely (eds), *The Bloomsbury Reader in Religion and Childhood* (London: Bloomsbury 2017) 323.

65 Patrick McAuliffe, ‘Comprehending Ireland’s Post-Catholic Redress Practice as a Form of Transitional Justice’ (2017) 6(3) *Oxford Journal of Law and Religion* 451.

66 Wright (n 59) 19-20.

67 Wright, Swain and McPhillips (n 16).

68 Katie Wright and Shurlee Swain, ‘Speaking the Unspeakable, Naming the Unnameable: The Royal Commission into Institutional Responses to Child Sexual Abuse’ (2018) 42(2) *Journal of Australian Studies* 139.

69 Katie Wright, ‘Challenging Institutional Denial: Psychological Discourse, Therapeutic Culture and Public Inquiries’ (2018) 42(2) *Journal of Australian Studies* 177.

## Limitations and Challenges of Inquiry Mechanisms

In the wider context of public inquiries into child abuse, a key identified weakness is that while repeated inquiries into related issues make similar recommendations, there is a general failure to learn the lessons from the past.<sup>70</sup> This problem is underscored by Swain's research on eighty-three Australian inquiries into institutions providing out-of-home care for children between 1852 and 2013, which draws attention to the fact that the same recommendations are being made time and again.<sup>71</sup> This is also demonstrated on the island of Ireland as outlined above, where despite numerous inquiries into non-recent abuses, there has been a failure to learn the lessons from the past. Further interrelated challenges of non-recent institutional abuse are the limits of inquiries in (1) addressing wide and structural issues of social, political and institutional power, limits of satisfactory explanations and questions of responsibility; (2) centralising victim/survivor participation and voice; and (3) fact-finding and truth seeking.

(1) **Structural issues regarding power, explanation and responsibility** – Inquiries initiated or run by elite-level actors such as the state may have underlying political aims which obscure the voices of victims/survivors<sup>72</sup> and fail to challenge the policy wrongs that were part of the systemic context in which abuses took place.<sup>73</sup> While at times challenging the wrongful actions of the perpetrators and the institutions involved in the harm,<sup>74</sup> inquiries have often failed to recognise the abuses as human rights violations,<sup>75</sup> and they have tended to be restricted in their potential to engage with the full truth of what happened, particularly in relation to the causes and policy wrongs that were part of non-recent harms. Some fail to validate the specific claims and allegations of individual victims/survivors.<sup>76</sup> Consequently, inquiries generally fail to address one of the most consistently expressed needs of victims/survivors, namely the need 'to discover: Why? Why was I sent there? Why did it happen to me?'<sup>77</sup> A further issue is that inquiries may instrumentalise victims/survivors by conveying

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70 Helen Buckley and Caroline O'Nolan, *An Examination of Recommendations from Inquiries into Events in Families and their Interactions with State Services, and their Impact on Policy and Practice* (Dublin: Government Publications 2013). See also Nigel Parton, 'From Maria Colwell to Victoria Climbié: Reflections on Public Inquiries into Child Abuse a Generation Apart' (2004) 13(2) *Child Abuse Review* 80.

71 Shurlee Swain, *History of Australian Inquiries Reviewing Institutions Providing Care for Children* (Australian Catholic University, 2014).

72 James Gallen, 'Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice' (2016) 10(2) *International Journal of Transitional Justice* 332.

73 Daly (n 1) 18.

74 Gallen (n 45); Marie Keenan, *Child Sexual Abuse and the Catholic Church: Gender, Power and Organizational Culture* (New York: Oxford University Press 2012).

75 O'Rourke (n 37).

76 McAlinden (n 10).

77 Carol Brennan, 'Facing What Cannot Be Changed: The Irish Experience of Confronting Institutional Child Abuse' (2007) 29(3/4) *Journal of Social Welfare and Family Law* 245, 261.

that the state is taking responsibility to address their suffering,<sup>78</sup> when in reality those affected by the wrongdoing have very little power over whether and how their experiences are addressed.<sup>79</sup>

(2) **Voice and Participation** – Inquiries are limited as a means of empowering victims/survivors by failing to centralise their voices and perspectives and promote meaningful participation.<sup>80</sup> While inquiries are generally intended to hear the testimonies of those who have experienced harm, in Ireland the fact remains that their voices have not been prioritised in responses. One example is the Commission of Investigation into Mother and Baby Homes in ROI,<sup>81</sup> whose final report was met with widespread criticisms around the extent to which evidence given by victims/survivors was considered by the Commission, ranging from inaccuracies in how individual cases are reported to the veracity of certain findings<sup>82</sup>, also reported by some religious participants in the Murphy Report.<sup>83</sup> Indeed, several women whose oral and documentary testimonies are inaccurately recorded in the report into mother and baby homes brought successful legal challenges to have the irregularities openly acknowledged alongside the report.<sup>84</sup> It has been argued that only testimonial driven inquiries can privilege the voices of those affected by abuses and challenge institutional and State accounts. In addition, victim/survivor access to personal information held in relevant State or Church archives may enable a more holistic reflection on non-recent experiences in their testimony. Again, the Australian Royal Commission was successful in this regard, enabling victims'/survivors' testimonies to speak to the rights denied to them in the past.<sup>85</sup>

However, the problem has been raised that even in inquiries facilitating victim/survivor voice, the dominant narratives of inquiry reports may not be representative of all victim/survivor experiences. Thus, while having the potential to convey lived experiences, inquiries can also contribute to the silencing of some narratives.<sup>86</sup> This is particularly problematic in light of Lundy's contention that a victim's/survivor's sense of justice is impacted not only by the original crime but also by the extent and nature of their involvement in the processes

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78 See McAlinden (n 10).

79 James Gallen, 'Transitional Justice and Ireland's Legacy of Historical Abuse' (2020) 55 (1&2) *Éire-Ireland* 35.

80 Gallen (n 45).

81 Department of Children, Equality, Disability, Integration and Youth (n 41).

82 Enright and O'Donoghue (n 43).

83 See Keenan (ns 30 & 32).

84 Gallen (n 45); Orla O'Donnell, 'State admits rights of mother-and-baby home survivors were breached' *RTE News* (Dublin, 17 December 2021) <<https://www.rte.ie/news/courts/2021/1217/1267369-mother-and-baby-homes/>> accessed 28 February 2023.

85 Fiona Davis, "'I Fought. I Screamed. I Bit': The Assertion of Rights within Historic Abuse Inquiry Transcripts' (2018)42(2) *Journal of Australian Studies* 217.

86 Johanna Sköld, 'The Truth about Abuse? A Comparative Approach to Inquiry Narratives on Historical Institutional Child Abuse' (2016) 45(4) *History of Education Society* 492.

instituted to investigate the wrongs.<sup>87</sup> To mitigate this problem, Lundy sets forth the need to craft a model which sensitively and creatively embraces the needs and interests of victims/survivors, involving full participation of victims/survivors from an early stage in its development and implementation, and incorporating appropriate support services to facilitate victim/survivor engagement.

- (3) **Fact-Finding and Truth Seeking** – While more effective inquiries can address a complex range of truth claims, the evidence remains ambivalent at best as to whether victim/survivor participation with truth seeking can have a therapeutic or healing effect,<sup>88</sup> and there remains risks that for some victims/survivors providing testimony ‘opens them up and leaves them with nowhere to go.’<sup>89</sup> A further and related issue here concerns the difficulties of addressing victim/survivor trauma, with Ring recognising the improbability of ever fully reconciling the need for victims/survivors to tell their stories on their own terms with the framework of inquiries.<sup>90</sup> As discussed below, this highlights the need to develop new forms of truth-telling underpinned by trauma-informed approaches.

In contrast, an inquiry may fail to make coherent its role in addressing both micro-level forensic forms of truth and broader, social, institutional and political forms of truth. McAlinden and Naylor emphasise potential tension between the goals of inquiries and restorative justice: ‘while the focus of public inquiries is on adjudication and establishing fault or responsibility for particular acts or omissions, restorative justice as a process is not about fact-finding for the determination of guilt, but rather reparation in the aftermath of harm and devising an appropriate response to admitted behaviour.’<sup>91</sup>

Although victim-centred inquiries may also offer a space to hear (in public) from all relevant and potentially responsible stakeholders, including alleged perpetrators and institutional actors and leaders, this has been limited and challenging in practice. Hamber and Lundy note that some victims/survivors were concerned and intimidated by the presence of members of religious orders at the HIA inquiry in Northern Ireland.<sup>92</sup> In the absence of public engagement and dialogue from all stakeholders, Niezen contends that perpetrators

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87 Lundy (n 48).

88 Michal Ben-Josef Hirsch, Megan MacKenzie and Mohamed Sesay, ‘Measuring the Impacts of Truth and Reconciliation Commissions: Placing the Global “Success” of TRCs in Local Perspective’ (2012) 47 *Cooperation and Conflict* 386, 387.

89 Meryll Lawry-White, ‘The Reparative Effect of Truth Seeking in Transitional Justice’ (2015) 64 *International and Comparative Law Quarterly* 141, 166.

90 Sinead Ring, ‘Trauma and the Construction of Suffering in Irish Historical Child Sexual Abuse’ (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 88.

91 McAlinden and Naylor (n 14) 286.

92 Hamber and Lundy (n 49) 755.

may become abstracted and reified in inquiries: ‘they are abstract (perceived as inhuman), represent the overall harm and, once labelled, are excluded from “truth telling” because their identification as perpetrators denies their legitimate speech.’ In his view, this makes the origins of mass crimes more difficult to identify, excluding ‘the institutional and policy driven sources of that suffering and the people who acted on them, sometimes in the belief that they were doing good.’<sup>93</sup>

The discussion now considers the key principles that lie at the heart of victim-centric justice that can nonetheless seek the participation and support of all stakeholders.

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93 Ronald Niezen, ‘Human Rights as Therapy: The Healing Paradigms of Transitional Justice’ in Danielle Celermajer and Alexandre Lefebvre (eds), *The Subject of Human Rights* (Stanford University Press 2020), 169-171.



# Key Principles of Best Practice

Literature examining global responses to non-recent institutional abuse, including empirical studies of victim/survivor views, identifies a number of key principles of best practice concerning what victims/survivors want or need from redress processes. These are discussed as follows: truth and gaining answers to questions; acknowledgement; accountability; procedural justice for victims/survivors and all participants; redress; and non-recurrence.

## *Truth and Answers to Questions*

People affected by non-recent institutional abuse require truth in terms of knowing what happened, why it happened, who was responsible and how they could justify what they did.<sup>94</sup> This requires that the wrongdoing is explicitly ‘named for what it was’<sup>95</sup> and that abuses experienced are recognised and responsible actors established, along with the root causes and explanations.<sup>96</sup> Many actors, most especially victims/survivors but also the institutions, the state and civil society, have an interest in finding truth and answers to questions. Many victims/survivors point out that truth can only be obtained through an authoritative examination of historical records of past abuses.<sup>97</sup> In addition, victims/survivors and family members also wish to be able to establish and validate their own personal testimony by gaining answers to important questions about their past lives or the lives of their relatives; an aspect requiring free and unfettered access to records and information.<sup>98</sup> However, gaining ‘the one’ objective truth<sup>99</sup> is rarely achievable given the multiple and varied experiences of victims/survivors and the differing views of church, state and civil society on their role and involvement in sustaining abusive regimes. Inquiries are generally a less effective means of addressing these multiple dimensions of truth, given that they examine past abuses through a process in which the terms of reference, composition of the inquiry, timeframes and budgets are instituted by the state which itself may be a party subject to

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94 Hamber and Lundy (n 49).

95 Anne-Marie McAlinden, ‘Are Effective Apologies for Historical Institutional Abuse Possible?’ (QPOL 16 February 2022) <<http://qpol.qub.ac.uk/are-effective-apologies-for-historical-institutional-abuse-possible/>> accessed 30 January 2023.

96 Lundy (n 48); see also Patricia Lundy, “Historical Institutional Abuse: What Survivors Want From Redress” (Ulster University: March 2016); Patricia Lundy, “‘I Just Want Justice’: The Impact of Historical Institutional Child-Abuse Inquiries from the Survivor’s Perspective” (2020) 55(1&2) *Éire-Ireland* 252.

97 Lundy (n 48).

98 Maeve O’Rourke, ‘Ireland’s ‘Historical’ Abuse Inquiries and the Secrecy of Records and Archives’ in Lynsey Black, Louise Brangan and Deirdre Healy (eds), *Histories of Punishment and Social Control in Ireland: Perspectives from a Periphery* (Emerald Publishing 2022) 107-138.

99 Kieran McEvoy, *Making Peace with the Past: Options for Truth Recovery in Northern Ireland* (Healing Through Remembering 2006).

the inquiry regarding allegations of policy or procedural or operational wrongdoing.<sup>100</sup> In Ireland, for example, the Ryan Commission<sup>101</sup> has been criticised for its failure to emphasise the nature and extent of state involvement in the institutions in which children were incarcerated and the limits of the inquiry framework in uncovering the truth about that particular past.<sup>102</sup> Similar criticisms have been raised in respect of the Commission of Investigation into Mother and Baby Homes, with the truth of its findings being particularly called into question.<sup>103</sup> A key part of gaining a full contextual truth is having a just approach to acknowledging experiences of abuse. Drawing on Fricker's framework of epistemic justice,<sup>104</sup> this requires an approach which both ensures that victims'/survivors' testimonies are not disregarded (testimonial justice), that their lived experiences of abuse are not ignored (hermeneutical justice),<sup>105</sup> and that their questions are answered to the fullest extent possible by key documents and institutional and state actors (restorative justice).

## Acknowledgement

Acknowledgement of wrongdoing involves explicit articulation or 'spelling out' of the offence,<sup>106</sup> together with a clear recognition of victims'/survivors' sufferings and their blamelessness for what they endured.<sup>107</sup> It also requires recognition of the enduring and often intergenerational impacts of the harm.<sup>108</sup> Inquiries in Ireland have generally failed to provide true acknowledgement of the causes and consequences of abuses. A preferable approach would be to acknowledge the harms as violations of Constitutional rights, domestic statutory obligations (civil and criminal), and international human rights law, including both historical legal standards and ongoing and unremedied rights violations for living victims/survivors. An important way of bringing acknowledgement, validation and vindication to victims/survivors is by ensuring that victims/survivors have a role in shaping and framing the inquiry with equal participation rights to other commissioners in the design and administration of an inquiry, as well as the right to exercise 'voice' in responses to their abuse.<sup>109</sup> Lundy's work on the justice needs of victims/survivors of childhood abuse in residential institutions in NI identifies participation as fundamental to acknowledgement.<sup>110</sup>

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100 McAlinden (n 10).

101 Commission to Inquire into Child Abuse (n 20).

102 See eg Bruce Arnold, *The Irish Gulag: How the State Betrayed its Innocent Children* (Gill Books 2009).

103 Gallen (n 45).

104 Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press 2009).

105 Máiréad Enright and Sinéad Ring, 'State Legal Responses to Historical Institutional Abuse: Shame, Sovereignty, and Epistemic Injustice' (2020) 55(1&2) *Éire-Ireland* 68.

106 Emma Catterall, *Apologies and Institutional Child Abuse* (Queen's University Belfast, September 2018) 7.

107 McAlinden (n 95).

108 Hamber and Lundy (n 49).

109 See Daly (n 1) 117.

110 Lundy (ns 48 & 96).

As noted above, one component of the NI Historical Institutional Abuse Inquiry<sup>111</sup> involved a confidential Acknowledgement Forum in which victims/survivors had the opportunity to provide their testimony. The motivation of many who participated was to have their voices heard in a manner which allowed the abuse to be publicly acknowledged. The Forum was generally regarded as a ‘positive first step in breaking the silence and denial’ around the wrongdoing.<sup>112</sup> However, the problem then arose that victims/survivors who chose to give testimony to the statutory inquiry (the second component of the NI process) reported being traumatised by the adversarial nature of the questioning which made them feel like ‘the guilty party,’<sup>113</sup> thereby arguably diminishing the acknowledgement potential of the Forum.

As mentioned above, this was similarly demonstrated in concerns about testimonies offered to the Confidential Committee element of the Commission of Investigation into Mother and Baby Homes in ROI. In reality, true acknowledgement can only be attained in processes where victims/survivors know that their lived experiences are valued and recognised, and that they are believed. It would be open to any future Irish inquiry to adopt practice guidelines similar to the Australian Royal Commission, specifying in advance the rules for inquiry treatment of witness, especially victim/survivor, testimony<sup>114</sup> and adopting a trauma informed approach to the work of the inquiry. Such an approach demonstrates the importance of the above-outlined concept of epistemic justice for victims/survivors and indeed for all participants, in terms of ensuring that victims/survivors, as a right, have their testimony carefully listened to and recorded and that their lived realities and perspectives directly influence institutional, state and civil society responses to their experiences of abuse.<sup>115</sup>

## Accountability

Justice requires holding the individuals who perpetrated the harms to account, as well as the organs and actors of church, state and civil society for those aspects of the abuses for which they bear responsibility, including the policy wrongs (such as diocese, religious orders, governmental departments, judiciary, civil society group or members etc). An aspect of accountability that is sensitive and complex within the overall context of institutional abuse relates to the communities and families that supported or turned a blind eye to abusive

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111 HIA Inquiry (n 47).

112 Lundy (n 48).

113 Lundy (n 48).

114 Royal Commission into Institutional Responses to Child Sexual Abuse, Practice Guideline 1 <<https://www.childabuseroyalcommission.gov.au/sites/default/files/practice-guideline-1.pdf>> accessed 27 March 2023.

115 Gallen (n 45); Colin Luoma, ‘Closing the Cultural Rights Gap in Transitional Justice: Developments from Canada’s National Inquiry into Missing and Murdered Indigenous Women and Girls’ (2021) 39(1) *Netherlands Quarterly of Human Rights* 30; Rosemary Nagy, ‘Settler Witnessing at the Truth and Reconciliation Commission of Canada’ (2020) 21 *Human Rights Review* 219.

regimes<sup>116</sup> along ‘the continuum of knowing.’<sup>117</sup> A much more nuanced conceptualisation of responsibility and accountability-taking is required here.<sup>118</sup>

Obtaining accountability across these layers of responsibility is generally problematic in the inquiry setting. In terms of individual accountability, many but not all victims/survivors want their abusers to be criminally prosecuted;<sup>119</sup> those who do face significant obstacles such as delays, evidence gathering from perhaps a long time ago, the impact of memory,<sup>120</sup> and the fair rights of an accused in the case of an allegation of non-recent abuse dating back years or even generations.<sup>121</sup> As regards civil litigation, obstacles include the potential cost to a litigant and a very restrictive time limitation period in bringing a case.<sup>122</sup> Given the difficulties of both criminal and civil proceedings, victims/survivors have often hoped that individual accountability will be addressed within inquiries but have been left mostly dissatisfied in this regard. In addition, legal barriers to holding particular organs of ‘the church’ to account for the actions of its clerics and their institutional failures to protect, such as the fact that religious orders may exist in law as unincorporated associations,<sup>123</sup> restrict the quality of justice and access to assets that can be obtained by litigants.<sup>124</sup> In terms of state accountability, acceptance of responsibility for non-recent institutional abuse and reluctance to consider the harms as human rights violations continues to be problematic.<sup>125</sup> Confronting difficult questions about the level and extent of state responsibility for non-recent institutional abuse, and the underlying structures and policy wrongs which allowed the wrongdoing to happen in the first place,<sup>126</sup> continues to be a challenge. Reliance on the existing law of tort to vindicate the constitutional rights of Irish citizens affected by non-recent abuses has proven highly difficult, while a human or Constitutional rights re-framing may offer an alternative and more symbolically and practically important route.<sup>127</sup>

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116 Harry Ferguson, ‘Abused and Looked After Children as “Moral Dirt”: Child Abuse and Institutional Care in Historical Perspective’ (2007) 36(1) *Journal of Social Policy* 129.

117 Keenan (n 74).

118 See Anne-Marie McAlinden, Marie Keenan and James Gallen (2024), *Transforming Justice Responses to Historical Institutional Abuses* (Oxford University Press), forthcoming.

119 Lundy (n 48).

120 James Gallen, ‘Historical Abuse and the Statute of Limitations’ (2018) 39(2) *Statute Law Review* 103.

121 Sinead Ring, ‘The Victim of Historical Child Sexual Abuse in the Irish Courts 1999-2006’ (2017) 26(5) *Social and Legal Studies* 562.

122 Colin Smith and April Duff, ‘Access to Justice for Victims of Historic Institutional Abuse’ (2020) 55(1&2) *Éire-Ireland* 100.

123 James Gallen, ‘Vicarious Liability and Historical Abuse: A Critical Analysis of Hickey v McGowan’ (2017) 58 *Irish Jurist* 184.

124 Smith and Duff (n 122).

125 Maeve O’Rourke, ‘The Manipulation of “Vulnerability”’: State Responses to So-Called “Historical” Abuses in Ireland’ (2021) 43(3) *Human Rights Quarterly* 435.

126 Gallen (n 79).

127 Contrast O’Keeffe v Hickey and others [2008] IESC 72 with O’Keeffe v. Ireland Application No. 35810/09, Judgment Grand Chamber 28 January 2014.

## *Procedural Justice for Victims/Survivors and All Participants*

There is a need to secure procedural justice for victims/survivors and all parties through fair processes focused on building trust and legitimacy. Procedural justice relates to the decision-making *processes* that shape outcomes, and how people's perceptions of fairness are strongly influenced by the way they are treated in the procedures and not only by the outcomes reached.<sup>128</sup> In the area of non-recent institutional abuse, Daly highlights the importance of procedural justice in terms of how responses address the constituent elements of 'participation, voice, validation, vindication, and offender accountability.'<sup>129</sup> These elements align with the idea of victim-centric justice which is primarily focused on the wants, needs and interests of the people affected by the wrongdoing, issues which again correspond with epistemic justice. A noteworthy feature of the Australian Royal Commission<sup>130</sup> is its 'prioritisation of survivor voices',<sup>131</sup> which contributed to procedural justice by promoting the previously denied right of victims/survivors to express themselves and be heard, along with their right to dignity. On the other hand, inquiries in Ireland have left victims/survivors wanting in terms of procedural justice. For example, victims/survivors of industrial and reformatory schools who recounted their stories to the Ryan Commission described hearings as akin to being on trial and causing re-traumatisation,<sup>132</sup> issues which have also been raised in respect of other inquiries as noted above. Furthermore, victim participation was adversely impacted in the Ryan Commission by the selection of a limited number of sample cases which meant that the experiences of some victims/survivors were subordinated and that the Commission did not report on all allegations of abuse.<sup>133</sup> One possible way of achieving a better sense of procedural justice for victims/survivors and all parties involved in inquiries is by incorporating a restorative justice framework in responses to non-recent institutional abuse.<sup>134</sup> The restorative justice framework is considered below in relation to alternative models.

## *Follow-through: Redress*

Redress is a key aspect of follow-through, and can take the form of monetary reparations, symbolic reparations such as apologies and memorialisation, and measures with therapeutic

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128 Tinneke Van Camp and Jo Anne Wemmers, 'Victim Satisfaction with Restorative Justice: More than Simply Procedural Justice' (2013) 19(2) *International Review of Victimology* 117.

129 Daly (n 1) 117-8; see also Kathleen Daly, 'Conceptualising Responses to Institutional Abuse of Children' (2014) 26(1) *Current Issues in Criminal Justice* 5.

130 Royal Commission (n 51).

131 Fiona Davis, 'The Royal Commission into Institutional Responses to Child Sexual Abuse: Learning from the Past' (2015) 41(2) *Australian Feminist Law Journal* 213.

132 Pembroke (n 21).

133 McAlinden and Naylor (n 14).

134 McAlinden and Naylor (n 14); Marie Keenan, *Sexual Trauma and Abuse: Restorative and Transformative Possibilities? A Collaborative Study on the Potential of Restorative Justice in Sexual Crime in Ireland* (University College Dublin School of Applied Social Science 2014).

and healing benefits. Monetary redress can have a critical purpose in validating the nature and extent of victims'/survivors' sufferings.<sup>135</sup> However, problems have emerged internationally around eligibility requirements,<sup>136</sup> timeframes for initiating redress processes<sup>137</sup> and the manner in which payments are calculated, as well as the non-admission of liability in schemes and the requirement for victims/survivors availing of redress to waive future rights to litigation.<sup>138</sup> For a redress scheme to be successful, it 'must have the participation of survivors and their representatives in the initiation, design, implementation and monitoring of the process.'<sup>139</sup> However, the needs of victims/survivors of non-recent institutional abuse internationally are significantly underrepresented in redress processes.<sup>140</sup> While monetary redress is crucial, it must also be accompanied by other forms of redress, such as access to health and therapy services, and include symbolic reparations, such as apologies or memorialisation. In terms of measures with therapeutic and healing benefits, the provision of tailored supports and long-term interventions can contribute to a holistic response by recognising the dignity and worth of victims/survivors and allowing them to safely confront their trauma experiences.<sup>141</sup> Such broader initiatives are essential to addressing the multiple detrimental effects of non-recent institutional abuse, including mental and physical health problems, as well as psychosocial and environmental problems such as housing and employment.<sup>142</sup> Apologies have become important to victims/survivors as a way to publicly acknowledge the harms and allow the institutions involved to express regret and accept responsibility.<sup>143</sup> Memorialisation can also contribute to public acknowledgement and can be particularly useful in recording the past to ensure that the

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135 Kathleen Daly, 'Money for Justice: Ex Gratia Redress for Historical Institutional Abuse' in Yarick Small, Amanda Kaladerfos and Mark Finnane (eds), *The Sexual Abuse of Children: Recognition and Redress* (Melborne: Monash University Publishing 2016).

136 Johanna Sköld, Bengt Sandin and Johanna Schiratzki, 'Historical Justice Through Redress Schemes? The Practice of Interpreting the Law and Physical Child Abuse in Sweden' (2020) 45(2) *Scandinavian Journal of History* 178.

137 Natasha Cortis and Ilan Katz, 'Waiting for Redress: Child Sexual Abuse Survivors' Experiences of Australia's National Redress Scheme' (2022) 129 *Child Abuse & Neglect* 105657.

138 Maeve O'Rourke, Jennifer O'Mahoney and Katherine O'Donnell, 'Institutional Abuse in Ireland: Lessons from Survivors and Legal Professionals' in Orla Lynch, James Windle and Yasmine Ahmed (eds), *Nothing About Us Without Us: Giving Voice to Diversity in Criminological Research* (Bristol University Press 2021).

139 Kathleen Mahoney and Patricia Lundy, *What Survivors Want: Part Two: A Compensation Framework for Historic Abuses in Residential Institutions* (Ulster University, May 2016) 4.

140 Patricia Lundy and Kathleen Mahoney, 'Representing Survivors: A Critical Analysis of Recommendations to Resolve Northern Ireland's Historical Child Abuse Claims' (2018) 7 *The Annual Review of Interdisciplinary Justice Research* 258.

141 Grace Sheridan and Alan Carr, 'Survivors' Lived Experiences of Posttraumatic Growth After Institutional Childhood Abuse: An Interpretative Phenomenological Analysis' (2020) 103 *Child Abuse & Neglect* 104430.

142 See eg Alan Carr, Hollie Duff and Fiona Craddock, 'A Systematic Review of the Outcome of Child Abuse in Long-Term Care' (2020) 21(4) *Trauma, Violence and Abuse* 660.

143 Catterall (n 106); Anne-Marie McAlinden, 'From Shame to Guilt: Negotiating Moral and Legal Responsibility within Apologies for Historical Institutional Abuse' (2022) 49(3) *Journal of Law and Society* 470.

wrongdoing is not repeated.<sup>144</sup>

## *Non-Recurrence*

Justice processes must not only look backwards towards addressing past abuses, but also look forwards in terms of requiring offenders to recognise past wrongdoing and committing to its non-repetition in the future. One of the main desires of victims/survivors is assurance that future generations of children will not have to experience similar forms of abuse.<sup>145</sup> To guard against non-recurrence, justice responses are encouraged to examine openly and critically the process of ‘othering’ vulnerable and marginalised women and children from low socio-economic and disadvantaged backgrounds which research suggests enabled and justified their harsh punishment and institutional abuse.<sup>146</sup> This requires comprehensive documentation of the past, drawing on the work of historians, social scientists and other academics in recording and analysing past childcare practices and victim/survivor experiences in ways which promote recovery of the truth and hold states to account.<sup>147</sup> The intergenerational nature of non-recent institutional abuse requires the same critical examination and response, as does the theological norms of various churches as to their role in past abuses and their adequacy for the contemporary life of believers and church actors.<sup>148</sup> Bringing about the social and political changes required to guard against recurrence of similar forms of abuse necessitates responses that bear witness to victim/survivor testimony, promote public awareness and education,<sup>149</sup> and involves institutional and state transformation. This requires inquiries that seek to learn from the past in order to positively influence the future protection of children and other vulnerable and marginalised groups.<sup>150</sup> It also entails apologies that offer a definitive promise of non-repetition and can be assisted through memorials that convey the lived realities of victims/survivors and spell out the explanations and reasons for the harm. Public education through civic initiatives and incorporating the teaching of historical abuses into primary and secondary school curricula can also play an important role in non-recurrence.

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144 Paula Shilliday, ‘Memorials to Historical Institutional Abuse: How and Why should Society Remember and What are the Challenges Involved’ (QPOL November 2022) <<http://qpol.qub.ac.uk/wp-content/uploads/2022/12/Paula-Shilliday-Briefing-Paper-10.pdf>> accessed 20 January 2023.

145 Katherine O’Donnell, Claire McGettrick and others, *Dublin Honours Magdalenes Listening Exercise Report Vol 1: Report on Key Findings* (Dublin: Justice for Magdalenes Research 2020).

146 Shurlee Swain, ‘Institutional Abuse: A Long History’ (2018) 42(2) *Journal of Australian Studies* 153.

147 See eg Shurlee Swain, Katie Wright and Johanna Sköld, ‘Conceptualising and Categorising Child Abuse Inquiries: From Damage Control to Foregrounding Survivor Testimony’ (2018) 31(3) *Journal of Historical Sociology* 282.

148 Keenan (n 74).

149 Jennifer O’Mahoney, ‘No Passive Tellers of Their Past: Jennifer O’Mahoney on Narrative Psychology and Historical Institutional Abuse’ (2020) 33 *The Psychologist* 68.

150 Matthew Colton, Maurice Vanstone and Christine Walby, ‘Victimization, Care and Justice: Reflections on the Experiences of Victims/Survivors Involved in Large-Scale Historical Investigations of Child Sexual Abuse in Residential Institutions’ (2002) 32(5) *British Journal of Social Work* 541.

## Alternative Models

Given the limitations and challenges of inquiries in achieving victim-centric justice for people affected by non-recent institutional abuse, and taking into account the key principles of best practice in addressing victim/survivor needs, this section looks at a sample of other ways in which states and societies internationally are addressing the need to provide ‘better’ justice for victims/survivors. These include Truth and Reconciliation Commissions; the National Inquiry Model in Canada; the Restorative Justice Inquiry in Canada; a proposed hybrid conventional-restorative/ transitional model; and the Northern Irish Truth Recovery Design Panel. (Table 2 outlines the key features of each alternative).







Table 2: Alternative Models (a)

Inquiry Model	Mode	Function/Methodology	Terms of Reference	Composition	Legal Powers	Types of Hearing	Outcomes	Impact on Policy & Practice
<b>TRUTH AND RECONCILIATION COMMISSION</b>	Capable of being established on either statutory or non-statutory basis	<p>Function is to investigate past human rights abuses, not with an aim to prosecute individuals, but to find out the truth about certain events</p> <p>A key purpose is acknowledgement of past wrongdoing</p> <p>Non-adversarial in nature</p>	State sets terms of reference	Comprised of a number of commissioners from various professional fields	<p>Can grant amnesty to perpetrators who confess their crimes truthfully and completely to the Commission</p> <p>Some Commissions have powers to compel production of evidence and testimony. Others rely on voluntary cooperation</p>	<p>Testimony can be heard in public or private</p> <p>Truth-finding mechanism allowing victims and perpetrators to relate their own accounts of the violations</p>	<p>To produce and publish a report of the findings, and confront the public with the truth</p> <p>Report can cover structural and historical background of violence, individual cases, regional trends, and the broader institutional and social environment which facilitated the abuse</p>	<p>Can make recommendations regarding redress, as well as reform of social and political systems</p> <p>Can make recommendations of measures to prevent future violations of human rights</p>
<b>NATIONAL INQUIRY MODEL CANADA</b>	Statutory	<p>To examine and report on systemic causes behind violence experienced by Indigenous women and girls</p> <p>To examine underlying historical, social, economic, institutional and cultural factors that contribute to the violence</p> <p>To examine practices, policies and institutions that facilitated violence</p> <p>To examine institutional policies and practices put in place in response to violence</p> <p>To conduct its investigation in an informal trauma-informed way which promotes reconciliation, helps public awareness and provides opportunities for people to share their experiences and views</p> <p>Non-adversarial in nature</p>	Widespread consultation with stakeholders in pre-inquiry stage to inform terms of reference and shape inquiry	<p>Five commissioners with a depth and mix of personal, academic and professional experience</p> <p>Diverse committee to recommend possible solutions</p>	<p>Power to call witnesses and require them to give evidence</p> <p>Power to require production of any document or item related to the investigation</p>	<p>Private and public hearings</p> <p>Truth-gathering Community Hearings for victims/survivors to recount their experiences (choice of public or private)</p> <p>Institutional Hearings to examine systemic nature of wrongdoing</p>	Produced final report drawing heavily on victim/survivor testimony	Made recommendations regarding actions to remove systemic causes of violence; ways to honour and commemorate missing and murdered Indigenous women and girls; and reform of policy and practice

Table 2: Alternative Models (b)

Inquiry Model	Mode	Function/Methodology	Terms of Reference	Composition	Legal Powers	Types of Hearing	Outcomes	Impact on Policy & Practice
<b>RESTORATIVE JUSTICE MODEL CANADA</b>	Statutory	<p>To examine history of Nova Scotia Home for Coloured Children and experiences of former residents; to empower those affected by the harms; and to engage affected and responsible parties in collaborative action to address legacy of wrongdoing and secure a better future</p> <p>Three stages involving gathering knowledge, analysing (making sense of) knowledge, and outcome in terms of acting on knowledge</p> <p>Non-adversarial in nature, instead focusing on principles such as inclusivity, participation, doing no harm and supporting healing</p>	Designed through a consensus-based process involving former residents, government, and community members	Led by a group of commissioners representing victims/survivors, government representatives and related professionals	<p>Prioritised voluntary participation and cooperation to provide all documentation in support of inquiry</p> <p>Every effort made before exercising formal powers to compel evidence (documents and other information) and to compel people to attend</p>	Operated through Restorative Circles	Produced final report	<p>Report contained actions, plans, commitments, and recommendations towards a fundamental shift in support of a way forward</p> <p>Report showed links between individual harm and systemic issues, whilst addressing the needs of those affected by past harm, the need for accountability, and commitments required to prevent reoccurrence</p>
<b>HYBRID CONVENTIONAL-RESTORATIVE/TRANSITIONAL MODEL</b>	Capable of being established on either statutory or non-statutory basis	<p>Truth-finding inquiry (informed by transitional justice principles) to confront systemic wrongdoing, combined with the option for an alternative restorative justice route</p> <p>Differs from Truth and Reconciliation model particularly in terms of the option for victims/survivors to choose to participate in restorative justice encounters with willing offenders</p>	Set by the government	<p>Inquiry usually chaired by judge or senior lawyer</p> <p>Restorative justice route facilitated by skilled practitioners</p>	See Table 1 for powers of different forms of inquiries	<p>Public or private inquiry hearings</p> <p>‘Confidential committee’ stage to allow victims/survivors to recount their stories and compile a public record of narratives</p> <p>Victims/survivors choose ‘investigatory’ route involving adversarial fact-finding and possible prosecution, or alternative ‘restorative’ route</p>	<p>Inquiry produces final report</p> <p>Restorative meetings conducted between victims/survivors and offenders on a consensual basis</p>	Recommendations on policy and practice reforms
<b>TRUTH RECOVERY DESIGN PANEL</b>	Both statutory and non-statutory components	<p>‘Integrated Truth Investigation’ comprising of an expert Independent Panel and a statutory public inquiry</p> <p>Independent Panel (non-adversarial, truth-telling phase for victims/survivors to recount their experiences) feeds into and informs statutory inquiry</p>	<p>As set out by the Panel team</p> <p>Terms of reference include respect for human rights of victims/survivors and their central involvement in the process</p>	<p>Chairperson of public inquiry to be from outside the jurisdiction with expertise in the area of abuse under investigation. Chairperson to work with an Inquiry panel that includes a victim/survivor representative and others with specialist expertise</p> <p>Membership of Independent Panel should include victims’/survivors’ representatives, as well as senior researchers/practitioners with experience in the area of abuse under investigation, human rights law and trauma-informed practice</p>	<p>Independent Panel does not have statutory powers to compel the production of evidence; given the extent and diversity of involvement of state and non-state actors, statutory powers are necessary</p> <p>Independent Panel can investigate and hear testimonies regarding systemic abuses but only a statutory public inquiry has the powers to establish individual and institutional responsibility</p>	<p>Private and public hearings</p> <p>Independent Panel records testimony through non-adversarial, trauma-sensitive process, ensuring informed choice in giving testimonies (confidential/in public; oral/written) and how testimonies are used (restricted to the Independent Panel/forwarded to the Inquiry/preserved in a permanent independent archive)</p>	<p>Independent Panel records testimony and publishes report</p> <p>Public inquiry produces final report as well as interim reports, and makes interim findings and/or recommendations</p>	<p>Independent Panel publishes findings on human rights violations experienced. Makes recommendations on measures to respond to and prevent recurrence of the human rights violations, including periodic recommendations to the inquiry</p> <p>Public Inquiry makes policy and practice recommendations</p>



## *Truth and Reconciliation Commission*

The Truth and Reconciliation Commission model (TRC) can be established on a statutory or non-statutory basis. Its core focus is on truth-telling processes tasked with reporting on the causes and context of past wrongdoing and offering victims/survivors and perpetrators public and private space in which to relate their individual experiences.<sup>151</sup> TRCs have been presented as a means of 'finding the balance between the need to know what happened in the past and moving forward, and encouraging people to see the 'truth' from someone else's standpoint.'<sup>152</sup> They also have an important role to play in enabling past abuses to become public knowledge and in creating a national memory which counters denial or minimisation of abuses.<sup>153</sup> Related to these wider truth-telling aims is the potential cathartic purpose for victims/survivors in having the opportunity to come forward and publicly recount their experiences. While truth-finding and redress measures are central to the TRC model, its engagement with accountability (which comes primarily through the amnesty mechanism for perpetrators who fully confess their crimes) can be problematic for achieving a sense of justice for victims/survivors.

The South African Truth and Reconciliation Commission (1995-2002) took the testimony of approximately 21,000 South African individuals, with 2,000 of them appearing at public hearings. The TRC incentivised the participation of alleged perpetrators by being empowered to provide a legal amnesty from criminal and civil prosecution in return for disclosure of involvement in human rights violations, as long as the crimes were politically motivated, proportionate, and there was full disclosure by the person seeking amnesty. In addition to making recommendations in relation to redress and reform, its final report named individual perpetrators and suggested that prosecution should be considered in cases where amnesty was not sought or was denied, if evidence existed. Research has found that public perceptions of fairness regarding the TRC's procedures and amnesty provisions increased if it was felt that victims/survivors were given a 'voice'.<sup>154</sup> Processes were regarded as procedurally fair if victims/survivors had the opportunity and time to tell their story.<sup>155</sup> Indeed, being able to break the silence around what happened and increase public awareness of their experiences was shown to bring a measure of personal

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151 Beth K Dougherty, 'Searching for Answers: Sierra Leone's Truth and Reconciliation Commission' (2004) 8(1) *African Studies Quarterly* 39.

152 Cheryl Lawther, 'Transitional Justice and truth commissions' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017) 357.

153 Patricia J Campbell, 'The Truth and Reconciliation Commission (TRC): Human Rights and State Transitions – The South Africa Model' (2000) 4(3) *African Studies Quarterly* 41.

154 James L Gibson, 'Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa' (2002) 46(3) *American Journal of Political Science* 540.

155 Brandon Hamber, *Transforming Societies after Political Violence: Truth, Reconciliation, and Mental Health* (Springer 2009).

benefit and relief.<sup>156</sup> However, other research indicates that many victims/survivors felt that their expectations were not met,<sup>157</sup> with the process often viewed as disempowering<sup>158</sup> and lacking in psychological benefit.<sup>159</sup> In broader terms, the problem also exists that viewing past wrongdoing as two-dimensional in terms of ‘victims’ and ‘perpetrators’ means that the structural injustices which allowed the abuse to happen, and the role of institutions in creating the context in which the wrongdoing flourished, are minimised.<sup>160</sup>

Turning to Canada, a Truth and Reconciliation Commission was utilised to examine the legacy of residential schools involving the removal of Indigenous children from their families.<sup>161</sup> The TRC emerged as a result of protracted litigation by victims/survivors of the Indian Residential Schools system against the government and churches that ran the schools.<sup>162</sup> Its mandate was ‘to tell Canadians about the history of residential schools and the impact those schools had on Aboriginal people, and to guide a process of reconciliation.’<sup>163</sup> Public and private hearings and events were conducted to collect testimonies from victims/survivors. However, it has been argued that the TRC’s emphasis on victim/survivor healing allowed non-Indigenous people to individualise the abuses within Indian residential schools as something that happened in the past, thereby obscuring the need to address the colonial structures which underpinned the wrongdoing.<sup>164</sup>

## *National Inquiry Model Canada*

Canada’s National Inquiry into Missing and Murdered Indigenous Women and Girls, a statutory inquiry reporting in 2019, is the latest truth-recovery body in Canada to look into and report on systemic causes of all forms of violence against women and girls.<sup>165</sup> The Inquiry went beyond an

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156 Brandon Hamber, Dineo Nagent and Gabriel O’Malley, “‘Telling it Like It Is’: Understanding the Truth and Reconciliation Commission from the Perspective of Survivors’ (2000) 26(1) *Psychology in Society* 18.

157 David Backer, ‘Evaluating Transitional Justice in South Africa from a Victims’ Perspective’ (2005) 12(2) *Journal of the International Institute* 8.

158 Catherine C Byrne, ‘Benefit or Burden: Victims’ Reflections on TRC Participation’ (2004) 10(3) *Peace and Conflict: Journal of Peace Psychology* 237.

159 Debra Kaminer and others, ‘The Truth and Reconciliation Commission in South Africa: Relation to Psychiatric Status and Forgiveness Among Survivors of Human Rights Abuses’ (2001) 178 *British Journal of Psychiatry* 373.

160 Lawther (n 152).

161 Truth and Reconciliation Commission of Canada, *Honouring the Truth; Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), Preface (unpaginated).

162 Kim Stanton, ‘Canada’s Truth and Reconciliation Commission: Settling the Past?’ (2011) 2(3) *International Indigenous Policy Journal* 1.

163 Truth and Reconciliation Commission of Canada (n 161) 131.

164 Rosemary Nagy, ‘The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission’ (2013) 7(1) *International Journal of Transitional Justice* 52.

165 National Inquiry into Missing and Murdered Indigenous Women and Girls, ‘Our Mandate, Our Vision, Our Mission’ <<https://www.mmiwg-ffada.ca/mandate/>> accessed 24 January 2023.

examination of ‘bodily integrity crimes’ to examine gross violations of Indigenous ‘cultural rights and cultural harm more generally.’<sup>166</sup> Indeed, its broad remit included social, economic, cultural, institutional, and historical causes contributing to the violence and vulnerability experienced by Indigenous women and girls. The Inquiry centralised the needs and interests of both survivors of violence and family members of lost loved ones ahead of the people and institutions who normally hold power (including politicians and governments).<sup>167</sup> In the pre-inquiry stage, the Canadian government carried out widespread consultations with thousands of stakeholders over the period of a year to determine the inquiry terms of reference, and also directly engaged in empowerment and consultation processes with an Elders and Grandmothers Circle. This resulted in final terms of reference which were better focused on the underlying causes of violence against women and girls and cultural violence.<sup>168</sup>

Participation in the Inquiry was open to all victims/survivors and family members, with those who chose to do so sharing their testimony at Community Hearings either publicly or in private depending on personal preference – known as Part 1 of the Truth-Gathering Process. Parts 2 and 3 involved Institutional Hearings, and Expert and Knowledge Keeper Hearings (involving Elders, academics, legal experts, front line workers, young people and others). These Hearings respectively examined the systemic causes of institutionalised violence and institutional responses and made recommendations on possible solutions. During Part 4 of the process, groups with a direct interest in the issue of violence against Indigenous women and girls (such as non-governmental organisations and Indigenous women’s organisations) offered recommendations, thus ensuring widespread rights to participation. The Inquiry’s final report draws heavily on the testimonies gathered from victims/survivors of violence and family members of lost loved ones, thereby reflecting their main concerns and demonstrating the real-life impacts of particular issues upon individuals, families and communities.

The National Inquiry in Canada highlights the value of a holistic approach to non-recent institutional abuse. This was achieved through meaningful participation and extensive consultation which prioritised the needs and voices of those affected by past abuses, offering them a safe space to recount their stories on their own terms and allowing them to play a key role in determining how their experiences should be addressed.<sup>169</sup> It was further realised through a strong emphasis on examining the roots causes of the abuse, gathering and engaging with knowledge on the underlying structural violence and cultural harms, and then making recommendations which comprehensively addressed all dimensions of the wrongdoing.<sup>170</sup>

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166 Luoma (n 115).

167 National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) (n 165).

168 Luoma (n 115) 30.

169 Gallen (n 45).

170 Luoma (n 115) 30.

## *Restorative Justice Inquiry Canada*

Another example of a recent victim-centric inquiry model prioritising truth, participation and voice, as well as engaging with the culture and structures at the root of past abuses, is the Nova Scotia Home for Coloured Children Restorative Inquiry which reported in 2019.<sup>171</sup> Former residents of the Home called for an alternative approach to a traditional inquiry involving a restorative way forward. The Inquiry's different approach to understanding and responding to past abuses was designed to recognise the relational nature of the harms and their legacy (reaching from the individuals directly affected to families, communities of interested parties and across generations), by examining the contexts, causes and circumstances as well as the institutions, systems and structures (historical, social and political) that allowed the wrongdoing to happen. The Inquiry did not involve adversarial processes, did not seek to attribute blame nor did it consider abuses in isolation or out of context, but looked backward to understand what happened and why, while looking forward to build the conditions for a better future. Its mandate was to examine the history of the Home and the experiences of former residents as part of the history and legacy of systematic racism in Nova Scotia; to empower those affected by the harms; and to engage affected and responsible parties in collaborative action to address the legacy of the wrongdoing and secure a better future.

A group of commissioners led the Inquiry, working together on the Council of Parties as the overarching governance and decision-making body. Commissioners were recommended by a design team which included former residents of the Home, with the selected group comprising former residents, Nova Scotian Community members, legal experts, members of the government, and a restorative process/facilitation expert. Former residents (the VOICES group) played a fundamental role, being part of the design team and actively participating in all phases to ensure 'that the process remained human-centred.'<sup>172</sup> The process sought to ensure a central place and space for the voices of former residents while recognising the collective responsibility of its work. The Council of Parties was supported by an advisory group who provided assistance and continuity from vision to implementation of the Inquiry and its recommendations, as well as a Reflection and Action Task Group to facilitate and ensure full involvement of public and governmental institutions with the Inquiry.

The Inquiry had three interrelated stages: gathering knowledge, analysing (making sense of) knowledge, and outcome in terms of acting on knowledge. It comprised many different processes, with much of the design and implementation work taking place in restorative circles where participants (both members of the Council of Parties who led the process and other participants who gave testimony) were brought together by a facilitator to reflect on and discuss

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171 Province of Nova Scotia, *Journey to Light: A Different Way Forward: Final Report of the Restorative Inquiry – Nova Scotia Home for Coloured Children* (2019).

172 Province of Nova Scotia (n 171) 33.



a series of focused questions. Circles are a helpful model of restorative justice which focus on connections and interrelationships of the parties involved in the process, thereby creating a space to talk and deliberate on what has happened and what needs to happen next. In light of the commitment to ‘doing no further harm’ especially to former residents, gatherings were based on a trauma-informed approach and were largely in closed settings so that participants were able to share freely in a safe environment. Different types of circles were utilised during the Inquiry. ‘Former Residents’ Sharing Circles’ were held from the outset to give priority to the voices of those affected by the harms. These focused on understanding residents’ lived experiences and the impacts of their time in the Home, with people having full control over what information they shared. Other circles included ‘Relationship-Building Circles’ to address the relationships between different parties connected to the Home; ‘Knowledge Sharing Circles’ to reflect on knowledge from the perspective of different parties and participants; and ‘Issue Dialogues Circles’ to deepen understandings of some of the core issues involved.

### *Hybrid Conventional-Restorative/ Transitional Model*

McAlinden and Naylor propose a hybrid model that incorporates restorative justice principles and elements of the formal inquiry model as a more effective route to achieving justice for victims/survivors and offenders in situations of non-recent institutional abuse.<sup>173</sup> This model would both increase the usefulness and legitimacy of inquiries or commissions of investigation as a core element of the overall response to past harms and enhance the standing of victims/survivors within the inquiry process. It would maintain the important inquiry function of publicly and politically engaging with the state’s commitment to confront systemic wrongdoing, while simultaneously addressing procedural justice problems around meaningful victim participation and offender accountability. As such, a hybrid model holds the prospect of promoting individual justice and institutional accountability, and of restoring public trust and credibility in the institutions implicated in the harm.

A key benefit of a restorative paradigm is its ability to enhance victim/survivor participation and voice, centralising the perspectives of those affected by abuse and providing a ‘more inclusive forum for victim narratives to be told.’<sup>174</sup> Unlike the conventional inquiry with its limited emphasis on victim participation and voice, restorative justice processes enable the victim/survivor to ‘put her claims in her own terms’ and not ‘have to accommodate to the dominant modes of legal/political discourse.’<sup>175</sup> Active participation can be cathartic for victims/survivors by challenging

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173 McAlinden and Naylor (n 14).

174 McAlinden and Naylor (n 14) 298.

175 Barbara Hudson, ‘Beyond White Man’s Justice: Race, Gender, and Justice in Late Modernity’ (2006) 10(1) *Theoretical Criminology* 29, 43.

the abusive power relations involved in past abusive relationships. The restorative paradigm can also have benefits for offender accountability. By directly engaging offenders in restorative justice processes, they can be helped to appreciate the profound impact of their actions on the lives of victims/survivors and their families. For victims/survivors, hearing church or state authorities take responsibility for their wrongful actions can have a powerful therapeutic effect.<sup>176</sup> Moreover, remorse on the part of the offender and empathy for victims/survivors shown through genuine acknowledgement of the harms may be less stigmatising to offenders than investigatory processes.<sup>177</sup>

To effectively embrace restorative justice in the inquiry framework, McAlinden and Naylor stress the need to ensure that it is part of a truly hybrid model and not merely an ‘add on’ to the end of the inquiry process. These scholars set forth two pathways for incorporating restorative, victim-centric elements of an inquiry. As well as the ‘confidential committee’ stage already widely utilised to give victims/survivors the opportunity to recount their stories and compile a public record of narratives, victims/survivors could then choose either an ‘investigatory’ route involving adversarial fact-finding and possible prosecution, or an alternative ‘restorative’ route with the option to participate in restorative encounters with willing offenders. On a variation of a hybrid model, others have proposed the potentiality for engagement in all three processes offering different opportunities for victims/survivors.<sup>178</sup> Victim/survivor consensus would be prioritised in the restorative route, together with the offender’s willingness to take part in the process and accept responsibility for the wrongdoing.<sup>179</sup> The restorative route could offer a vital alternative means of addressing the wider range of procedural justice needs of victims/survivors – such as participation and voice – which are currently lacking within traditional inquiry mechanisms.

## *Truth Recovery Design Panel*

The final model to be considered is that proposed by the Truth Recovery Design Panel in 2021 to address past abuses related to Mother and Baby Institutions, Magdalene Laundries and Workhouses in Northern Ireland.<sup>180</sup> This emerged following a six-month period of expansive

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176 Lode Walgrave and Ivo Aersten, ‘Reintegrative Shaming and Restorative Justice: Interchangeable, Complementary or Different?’ (1996) 4(4) *European Journal of Criminal Policy and Research* 67.

177 Nathan Harris, Lode Walgrave and John Braithwaite, ‘Emotional Dynamics in Restorative Conferences’ (2004) 8(2) *Theoretical Criminology* 191.

178 Marie Keenan and Ian Marder, ‘Restorative inquiry would put Survivors at Centre of Response to Schools Abuse’ *The Irish Times* (Dublin, 28 February 2023) <<https://www.irishtimes.com/opinion/2023/02/28/restorative-inquiry-would-put-survivors-at-centre-of-response-to-schools-abuse/>> accessed 20 March 2023.

179 Bronwyn Naylor, ‘Effective Justice for Victims of Sexual Assault: Taking Up the Debate on Alternative Pathways’ (2010) 33(3) *University of New South Wales Law Journal* 662.

180 Mahon, O’Rourke and Scraton (n 50).

engagement and consultation with victims/survivors and other stakeholders who were placed at the centre of designing the investigation. Importantly, the Truth Recovery Design Panel sets forth the need for a human rights framework to underpin approaches to addressing the abuses related to these institutions.<sup>181</sup>

A core component of the recommended process is the establishment of an ‘Integrated Truth Investigation’ involving an expert non-statutory Independent Panel to feed into a statutory public inquiry. The Independent Panel element of the integrated process is described as a non-adversarial, truth-telling phase. Its main terms of reference are to record the testimonies of victims/survivors and their families on their own terms in a safe and supportive environment, and to gather documentary and other primary evidence to record the harms and violations suffered and their longer-term impacts and consequences. It also involves the provision of supports to help with accessing records and information concerning both victims/survivors themselves as well as deceased children and women. While constituting a discrete process to become part of a truth-telling archive to recognise victims’/survivors’ experiences, record the truth and speak to future generations, the Independent Panel will also importantly inform a statutory public inquiry. The inquiry’s terms of reference include respect for the human rights of victims/survivors and family members and a commitment to protecting and fulfilling human rights; full access to information for victims/survivors and relatives; the central involvement of victims/survivors and their families; and accountability to victims/survivors and their families. The human rights- and victim-centric nature of this recommended integrated response ensures that the needs, voices and lived experiences of victims/survivors remain central to the entire process of addressing past abuses.

Other components of this model include Access to Records legislation, preservation of all records, and urgent redress payments which should be based on procedures agreed in consultation with victims/survivors. It also involves the initiation of events to encourage public engagement, together with other forms of public memorialisation.

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181 Maeve O’Rourke, *A Human Rights Framework: Background Research for the Truth Recovery Design Process* (Truth Recovery Design Process 2021).

## Key Principles and Recommendations



## Key Principles and Recommendations

- **PROCEDURAL JUSTICE** – for victims/survivors based on the understanding that the lived experiences of justice processes for victims/survivors are just as important and impactful as any eventual outcomes; and for all participants, in an effort to engage affected and responsible parties in a mode of inquiry informed by truth-telling, finding answers to questions and developing meaningful and intelligible explanations.
- **A VICTIM-CENTRIC APPROACH** – there is a fundamental need to recognise the wide-ranging interests and views among a diverse group of victims/survivors and prioritise taking account of the range of individual experiences and needs recognising victims/survivors as the experts in their own experiences.
- **COMPOSITION OF THE COMMISSION** – Victims/survivors, representatives of other parties with primary interest in the topic being investigated, as well as those with legal, social science and other relevant expertise should comprise the panel of commissioners, appointed by open competition.
- **INFORMING VICTIM/SURVIVOR EXPECTATIONS** – governments and other actors involved in providing justice responses must reflect on the rhetoric and claims they make about their proposals to inquire into non-recent institutional abuse. Most justice initiatives are inherently inadequate, and it is only in narrow circumstances that claims to be healing (therapeutic, or comprehensive regarding the truth) can be validated. It is better to avoid over-promising and under-delivering.
- **MODULAR APPROACH** – addressing wide-ranging issues of non-recent institutional abuse can result in a multi-year investigation or inquiry with delayed outcomes. The Australian Royal Commission and other inquiries demonstrate the ability to design an inquiry to address immediate and narrow institutional contexts, and to issue specific interim reports on these topics which also feed into and extend to a broader and more systemic analysis of non-recent abuse issues that offer a more holistic and systemic examination of the issues, causes and contexts.
- **EFFECTIVE INDEPENDENCE** – in light of significant victim/survivor distrust of state-led mechanisms to address the past, and ongoing criticisms of prior approaches, there is a need to demonstrate the effective independence of any further mechanisms. This involves independent staffing, beyond the appointment of any commissioners for the inquiry, rather than seconding staff from a Department that may be under investigation or from other parts of the civil service. An open competition for hiring, and the recruitment of staff with training in trauma sensitivity, human rights law and restorative thinking as well as other relevant disciplines will significantly enhance the credibility and effectiveness of future inquiries.

- **INDEPENDENT OVERSIGHT** – an independent oversight body should be appointed to review the processes and mechanisms in place for any inquiry, irrespective of the mode.
- **‘COLLABORATIVE REDRESS’** – every effort should be made to consult as widely as possible with victims/survivors and to ensure their full and meaningful participation in the design and operation of responses. Such approaches should avoid the limitations of the existing ex gratia approaches that fail to engage in effective acknowledgement of past abuses as legal wrongs.
- **TRAUMA AND CARE-INFORMED APPROACHES** – there is a need to develop new forms of truth-telling which offer supportive, trauma-informed, person-centred spaces to hear victim/survivor voices. This also means recognising the need for ‘equality of arms’ between victims/survivors and the state/church in terms of the provision of tailored support and legal and other resources.
- **A HOLISTIC APPROACH** – it is important that redress is comprehensive and incorporates both material (e.g. compensation; access to medical and other support services) and symbolic forms of reparation (e.g. apology). This also entails designing truth-finding measures to examine the causes, consequences and contexts of abuses as well as provide acknowledgement and accountability to victims/survivors.
- **REMOVING LEGAL BARRIERS** – prior literature recognises that the design of inquiries (including tribunals, commissions of investigation and public inquiries) can be limited in their legal impacts. In addition, non-recent abuses pose particular challenges for the use of ordinary criminal and civil law. Other jurisdictions have engaged in more extensive reform of the statute of limitations, protective cost orders, class actions, funding for civil legal aid, and victim/survivor access to archives. Further reforms and provision of resources should be considered to enable greater victim/survivor access to justice.
- **HUMAN RIGHTS OBLIGATIONS** – there is a need for a response based on Ireland’s national and international legal human rights obligations which recognises and addresses the abuses involved as gross violations of human rights.
- **CONSISTENCY AND FOLLOW-THROUGH** – this is required in relation to the enactment of the recommendations of inquiries or investigatory commissions such as the timely provision of monetary redress and access to personal records. It also necessitates ‘joined-up’ approaches taken locally, regionally and nationally.

## Summary

Literature on international responses to non-recent institutional abuse along with the reactions of victims/survivors and their families are bringing increased awareness to the problems with approaches adopted to date. What has become clear across the island of Ireland is that overly legalistic responses have left much to be desired for the people most affected by the wrongdoing. Further, despite legislation purporting to offer inquiries of an inquisitorial nature, victims/survivors and church actors have experienced commissions and inquiries as adversarial in practice, increasing the trauma experience for victims/survivors and leaving some religious leaders feeling ‘on trial’. The sampling nature of inquiries has come in for significant criticism from victims/survivors as well as social scientists and clerics, albeit for differing reasons. All in all, the limitations of conventional modes of inquiries emerge in this review.

Evidence pinpoints a number of key issues that must underpin processes capable of addressing the needs and expectations of victims/survivors and providing justice. In this regard, it is critical that responses engage robustly with truth, acknowledgement, and accountability, and move beyond the position where the state maintains control in the areas of information and resources.

In addition, the procedures adopted must be regarded as trustworthy and unbiased ways of delivering justice, and the outcomes reached must be deemed fair and just by victims/survivors, offenders, institutions and state actors. Furthermore, victims/survivors must be authentically recognised as experts on their experiences of abuse, a factor requiring that responses are directly influenced by widespread consultation and that the victim/survivor community is meaningfully involved in the operation of inquiries. Church, state and civil society must be prepared to engage with the structural underpinnings of past abuses and policy wrongs and move towards structural change through processes centring the voices of victims/survivors, their participation in crafting responses aligned with their needs and inclusive processes that seek understanding and explanation as well as accountability. Justice founded on these dimensions which sensitively balances the interests of all involved can represent holistic or transformative justice, ensuring that the needs and wants of victims/survivors, offenders, institutional actors, states and civil society are respected.

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